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IN THE
Supreme Court of the United States
OCTOBER TERM, 1942

THE NEW YORK TRUST COMPANY, as the Trustee under the
Debenture Agreements between it and THE UNITED
LIGHT AND POWER COMPANY; MARY A. WALDRON, FRED-
ERICK H. BRUNNER, AMERICAN EQUITABLE ASSURANCE
COMPANY OF NEW YORK, KNICKERBOCKER INSURANCE
COMPANY OF NEW YORK, NEW YORK FIRE INSURANCE
COMPANY, MERCHANTS AND MANUFACTURERS INSURANCE
COMPANY OF NEW YORK, and AMERICAN RESERVE INSUR-
ANCE COMPANY,

Petitioners,

against

SECURITIES AND EXCHANGE COMMISSION and THE UNITED
LIGHT AND POWER COMPANY.

**PETITION (WITH BRIEF) FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT**

BEN LEROY STOWELL,
IRWIN L. TAPPEN,
HOWARD A. MARX,
For Petitioners.



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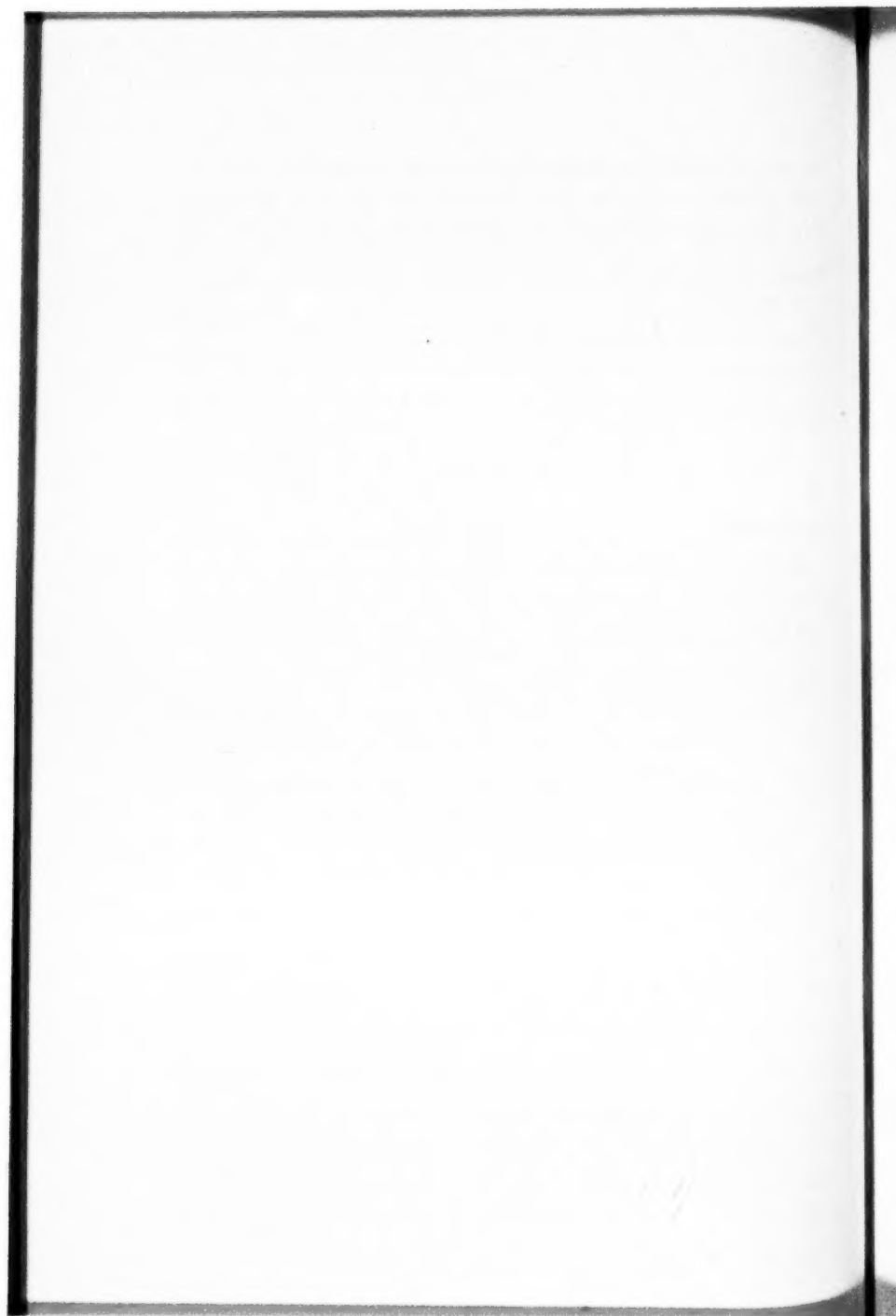
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*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

The petitioners named above respectfully show that:

The New York Trust Company (hereinafter called the Trustee) is a New York corporation. The Securities and Exchange Commission (hereinafter called the Commission) was established under Section 4, Title I, of the Securities Exchange Act of 1934 and is charged with the administration of the Public Utility Holding Company Act of 1935, approved August 26, 1935 (hereinafter called the Act). The United Light and Power Company (hereinafter called Power) is a Maryland corporation. The

petitioners other than The New York Trust Company were the owners and holders of debentures of Power at the time the Commission made its order of February 25, 1942, referred to below and hereinafter called the Order (R. 316), and they are entitled to share in the distribution of the escrow fund mentioned below in case it shall be finally determined that the debentureholders are entitled to the fund.

Statement of the Matter Involved

This petition presents questions of public importance in the administration of the Act, not yet settled by this Court. The Act provides, among other things, for the simplification of public utility holding-company systems, and in the so-called "great-grandfather clause" of Section 11(b)(2) directs the Commission to require each holding-company system having more than three tiers of companies to take such action that it will no longer have more than three tiers. The Commission is directed to require each registered holding company "to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company." To state the situation in the simplest form: Power is a public utility holding company, the top company of the system, superimposed upon two tiers of sub-holding companies (R. 297; chart of the system, R. 111). At the base of the system are the operating companies; above them, the parent companies; next, the grandfather company (The United Light and Railways Company, hereinafter sometimes referred to as the top subsidiary); and finally Power, the great-grandfather company. Accordingly, the system is a great-grandfather system and was declared by the Commission to be "repugnant to the requirements of the great-grandfather clause" (R. 297).

The proceeding in which the Order was made was instituted by the Commission in December, 1940, under Section 11(b)(2) of the Act. In that proceeding the Commis-

sion held a hearing "limited to a consideration of and to the taking of evidence with respect to what action should be required to be taken by the respondents in order to bring the holding-company system into compliance with the requirements of the great-grandfather clause" (R. 97) and thereupon, on March 20, 1941, the Commission made an order directing that Power be liquidated and dissolved, in which order the Commission stated that it had found such liquidation and dissolution to be necessary and appropriate for the purpose of bringing about compliance with the great-grandfather clause (R. 115).

It is important to note that the dissolution of Power is a matter of the holding-company system as a whole. It is the system, not Power itself, that is repugnant to the requirements and is to be brought into compliance. The dissolution, as the Commission said, is a step toward securing compliance (R. 100-102).

Power had debentures in a large amount outstanding in the hands of more than 6100 holders, each debenture being a negotiable instrument issued for money advanced to the obligor (R. 181) and containing a promise to pay a specified sum on a specified date (in 1973, '74 or '75 as the case might be) and a promise to pay interest thereon semi-annually until payment in full of the principal sum, and each redeemable at the option of Power upon payment of the principal amount plus accrued interest together with a redemption premium (R. 220-229). It was proposed by Power at hearings before the Commission that the debentures be retired at the principal amount plus accrued interest (without payment of the redemption premiums) although retirement without payment of the premiums was not provided for in the debentures or the agreements under which they had been issued, save only in the event of default and the acceleration of maturity by the Trustee acting on behalf of the debentureholders; but in making the dissolution order of March 20, 1941, the matter of the retirement of the debentures was left for future determination, the Commission saying (R. 103, footnote 8):

"Like other details of the proposed program, it is unnecessary for us to consider, at least at this time, whether such redemption premium must be paid on dissolution." Neither the Trustee nor any of the debentureholders were parties to the proceeding in which the dissolution order was made. No judicial review of that order was sought. No single, complete plan for the liquidation and dissolution of Power was presented at that time or any other time. The order of dissolution provided that Power might submit "a plan", but instead of submitting one comprehensive plan Power submitted a series of plans, each limited to a single step.

The Plan for the retirement of the debentures was presented to the Commission by Application Number 8, dated January 19, 1942 (R. 178), the object of the Plan being the retirement of the debentures by payment of the principal amount plus accrued interest without payment of redemption premiums. By its Order of February 25, 1942, the Commission directed that the Plan be carried out. As provided in the Order, a fund equal in amount to the redemption premiums is held in escrow for distribution among the debentureholders in the event of a final determination entitling them to the premiums.

The opinion, findings and order of the Commission appear on pages 294-318 of the Record. It held that the terms of the debenture contracts create no contractual obligation on the part of Power to pay a redemption premium and no right on behalf of the debentureholders to receive such premium and that no such obligation or right exists by virtue of any other recognized legal or equitable principle, and further that the contention of the debentureholders that, even if the redemption provisions are held inapplicable, still some compensation must be given to the debentureholders for the premature termination of their investments, is completely disposed of by the consideration that the termination of the investments of debentureholders and stockholders alike has been brought about by Congressional mandate.

Pursuant to Section 24(a) of the Act, the petitioners herein obtained a judicial review by the United States Cir-

cuit Court of Appeals for the Second Circuit, which affirmed the Order (its decree of affirmance being entered December 4, 1942) over objections of the petitioners to the effect, among other things, (a) that the making of the Order was not necessary for the purpose specified in the great-grandfather clause, was beyond the Commission's power, disregarded the distinction made by the commerce clause of the Constitution between commerce "among the several States" and the internal concerns of the States, and was in contravention of the Fifth and Tenth Amendments and the basic principle (underlying the Constitution) protecting lawful contract rights, (b) that in any event the debentureholders were entitled to compensation in the amount of the redemption premiums for the premature termination of their investments, and (c) that the Plan approved by the Order was unfair and inequitable with respect to the debentureholders.

The opinion of the court below (R. 320) is reported in 131 F. (2d) 274—advance opinions. The court overruled, or, speaking more precisely, passed over, the contention of the petitioners that the making of the Order was not necessary for the purpose specified in the great-grandfather clause and then held that the debenture agreements contemplated as indispensable the continued existence of Power, that such continued existence was needed to enable Power to pay from time to time as promised "and needed also to give it any inducement when the condition of its affairs might make such payment advantageous to exercise its privilege to pay a stated premium to relieve itself of the burden to pay interest as otherwise agreed", and that such continued existence was made impossible by the dissolution order. At that point the court said: "So much being established, we have no occasion to discuss any more fully the Commission's creation or powers from a constitutional or other viewpoint." The court then turned to the consideration of "the effect on the debenture agreements of a lawful governmental order requiring the obligor to liquidate and give up its existence as a corporation before all payments of interest on the bonds have been made

as agreed", and held that the debenture contracts were "no longer binding" and that the future interest payments were excused because by the Order the "venture has been frustrated" (pointing out that the reason for excusing such payments was not that performance of the promise to make such payments had been made impossible by the dissolution order, since substantial performance was possible because the obligor was in a position to make payments in the amount of the redemption premiums as the equivalent of the future interest payments).

Jurisdiction

By virtue of a provision in the last sentence of Section 24(a) of the Act, under which section the court below made its decree of affirmance, such decree is "subject to review by the Supreme Court of the United States upon certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (U. S. C., Title 28, Sections 346 and 347)".

The Statute

As the foregoing statement discloses, the portion of the Act which is of primary importance in this controversy is Section 11(b)(2) and particularly the second sentence, commonly called the great-grandfather clause. Section 11(b)(2) provides that it shall be the duty of the Commission—

"(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company)

to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company."

In the opinion of the court below, subsections (d) and (e) of the Act are mentioned in connection with subsection (b). The importance of subsections (d) and (e) in the present controversy is not apparent. (They are included in excerpts from the Act which, for the convenience of the Court, are appended to the brief accompanying this petition.) The procedure provided for in subsection (d) was not adopted in this matter. With respect to subsection (e) the Commission said (R. 305, footnote) that the fact that Power's application was designated as being filed under subsection (e) was "not of controlling importance" and further: "It was filed as permitted by our order pursuant to Section 11(b)(2), and it is Section 11(b)(2), as applied to the particular holding-company system, that is the moving force."

The Act contains several groups of regulatory provisions. The validity of the group of provisions requiring holding companies to register and furnish information was sustained in *Electric Bond & Share Co. v. Securities and Exchange Commission*, 303 U. S. 419 (1938). But this Court did not pass upon the validity of any other provision of the Act, saying that it was unnecessary to do so (p. 439).

The Questions Presented

This petition presents interesting and important questions typical of those arising from time to time in connec-

tion with the dissolution of corporations under the great-grandfather clause. Of special importance are questions relating to the Commission's power to deal with obligations like the debentures and those relating to the effect of the Commission's dissolution orders upon such obligations, particularly upon the promises of the obligors to make future interest payments. The questions may be stated as follows:

1. Has not Congress withheld from the Commission power to deal with such obligations as the debentures in connection with the dissolution, under the great-grandfather clause of the Act, of the obligor company? Involved in that question is this: Was the action directed by the Commission with respect to the debentures necessary to attain the objective of the great-grandfather clause?

2. Was not the Commission's action (whether or not the Act purported to authorize it) in contravention of the Constitution and the basic principle underlying the Constitution which strictly limits the power to impair or destroy the lawful contracts of citizens? Involved in that question are these: Are the rights of the debentureholders beyond the commerce power conferred upon the national government by the Constitution; in other words, in the absence of any showing of relationship between the rights represented by the debentures and interstate commerce, may the national government deal with the debentures? Did not the Order—directing as it did the payment of the debentures without compensation to the holders for the termination of their investments before the stipulated maturity dates—violate valuable contract rights of the debentureholders in contravention of the Fifth and Tenth Amendments of the Constitution and the basic principle mentioned above?

3. Is not the Order invalid for failure of the Commission to make specific findings (stating the basic facts and reasons) that the matters which it sought to dispose of by the Order were within the jurisdiction or power of the Com-

mission and that it was necessary for the Commission, in order to fulfill its duty under the great-grandfather clause, to dispose of those matters as it sought to do by the Order?

4. Did the order directing the dissolution of Power have the effect apparently assigned to it by the court below upon the standing of the debentureholders to question the Commission's power to make the subsequent Order directing the retirement of the debentures?

(The court below apparently assumed that when the order directing the dissolution became final, objections of the debentureholders which might otherwise have been considered as to the power of the Commission to make the subsequent Order directing the retirement of the debentures became irrelevant.)

5. Were the Trustee and the debentureholders precluded from questioning the necessity of the Plan approved by the Order—in other words, the jurisdiction of the Commission—because in the opinion of the court below the debentureholders were awarded all they were entitled to?

(The court below said—R. 323—that “the debentureholders are in no position to question the necessity of a provision in a plan which provides cash for them in exchange for their bonds to the full extent of the contract in the bond, and this is especially true of the holders of callable bonds like these”.)

If it were assumed that the Commission has power to deal with the debentures and that the decision of the court below should not be reversed for any of the reasons suggested above, then the questions set forth below would arise.

6. When a corporation in the situation of Power, which is in process of liquidation and dissolution by order of a governmental agency (the Commission) and which has outstanding long-term obligations, issued for the repayment

of money advanced to it and containing promises to pay interest semi-annually to the maturity dates specified therein and providing that the obligations may be redeemed before the specified maturity, at the option of the obligor, upon payment of premiums in addition to principal and accrued interest, retires such obligations in the course of liquidation, is it excused from keeping its promises to pay future installments of interest even to the limited and practicable extent of making payments in the amount of the redemption premiums in lieu of such future installments?

(By the phrase "the situation of Power" used in the foregoing question, its situation in its holding company system and the situation arising from certain provisions of the debentures and the debenture agreements are included.)

7. Are not the debentureholders entitled to receive payments in the amount of the redemption premiums in lieu of future interest payments and as compensation for the premature termination of their investments?

8. Was not the Plan approved by the Order unfair and inequitable with respect to the debentureholders?

9. Should there not have been a single, complete plan and a finding by the Commission that such plan was fair and equitable to the persons affected thereby?

Reasons for Allowing the Writ

I

The questions set forth above are important questions of federal law which have not yet been settled by this Court. Similar questions are arising from time to time in other liquidations under the great-grandfather clause; for instance, the North American Light and Power Company liquidation (see the Commission's order for the retirement of its debentures, page 11 of Holding Company Act, Release No. 3658, July 11, 1942). That order is under review

by the United States Circuit Court of Appeals for the Seventh Circuit. Its decision has not been announced.

II

In so far as there are decisions of this Court applicable to the questions decided by the court below, its decision probably—to say the least—was in conflict with applicable decisions of this Court; but the questions seem to be largely without precedent in this Court.

III

As to Question 1: Did not Congress withhold from the Commission the Power to deal with these Debentures?

The Commission's Order is beyond the power delegated to it by Congress, because the power so delegated with respect to proceedings under the great-grandfather clause is limited to action "necessary" to attain the objective of that clause and the action directed by the Order is not necessary for that purpose.

There is just one purpose in the dissolution of Power, and each step proposed in connection with the dissolution must be considered in relation to that purpose. The purpose is to bring about compliance with the great-grandfather clause (as the Commission said in the dissolution order—R. 115), in other words, to attain the objective of that clause. The objective is such simplification of each public-utility holding-company system which has more than three tiers of companies that it will no longer have more than three tiers. As the clause has been applied to Power by the dissolution order, the objective is that Power "shall cease to be a holding company with respect to each of its subsidiary companies", etc., that is to say, a great-grandfather holding company. The Commission, taking note of the fact that there were more than three tiers of companies in Power's system, said that to meet the requirements of the clause "several companies must be eliminated from the system or other steps must be taken so that such companies will cease to be holding companies" and con-

cluded that Power should be eliminated from the system "as a step towards securing compliance" with such requirements (R. 99-101).

By the great-grandfather clause action which may be taken thereunder is limited to such action as the Commission shall find necessary to attain the objective of that clause, without regard to the objective of any other clause or section of the Act. The clause is clear and precise. It defines the action which may be taken thereunder as "such action as the Commission shall find necessary in order that such holding company shall cease to be" a great-grandfather holding company. But that carefully-worded provision has not been observed in this instance; there is no finding or holding by the Commission or by the court below to the effect that the action taken with respect to the debentures was necessary in order that Power should cease to be a great-grandfather holding company.

It is evident from the phraseology of the Act that Congress was endeavoring to keep within the limits of its commerce power and that in delegating authority to the Commission it aimed to limit the authority to action needed for "the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce"—to use the words of Mr. Justice STONE in two cases cited on page 11 of the accompanying brief. Congress, believing that the simplification of holding-company systems to the extent required by the great-grandfather clause was needed for the effective execution of such granted power, and bearing in mind that so far as intrastate matters such as the rights represented by the debentures are concerned, the reach of that power extends only to those matters "which in a substantial way interfere with or obstruct the exercise of the granted power" was careful to withhold from the Commission the power to go beyond that limit. No doubt, that is why in the great-grandfather clause the authorized action is limited to action necessary to the attainment of the objective of that clause.

It is clear that the action taken with respect to the debentures was not within the limit fixed by Congress in the

great-grandfather clause, that it was not needed for the attainment of the objective of that clause as applied to Power's system, namely, to cause Power to cease to be a holding company in the system. As it was Power's ownership of the common stock of the company next below it in the system, the top subsidiary, that gave Power its connection with the system (R. 31), the distribution of such stock among Power's stockholders, without touching the debenture contracts, would cause Power to cease to be a holding company in the system. The Commission decided to bring about such distribution of stock, and consequently the elimination of Power from the system, and decided to attain that end by means of the dissolution of Power. Thereupon it made the order directing that Power be dissolved.

Thus it appears (a) that the dissolution of Power is only a means to the attainment of the objective (which is that Power "shall cease to be" a great-grandfather holding company) and has a place in the operation under the great-grandfather clause only to the extent that certain steps in the dissolution proceedings effectuate the distribution among Power's stockholders of the common stock of the top subsidiary and thus serve to attain the objective and (b) that such steps are the only steps which can be held to be necessary—really needed—for the attainment of the objective. It is clear that the disposition of the debentures was not one of those steps, as it could not conceivably have any effect upon the distribution of the stock. It has not been contended by anyone in this case that the disposition of the debentures is necessary to effectuate, or has any effect upon, such distribution. It is merely a collateral matter, not in the line of the steps leading to the objective. The Act does not empower the Commission to deal with such collateral matters. It clearly restricts the Commission to action in the direct line leading to the objective. That is the plain meaning of the word "necessary" in the great-grandfather clause. The action which the Commission has taken with respect to the debentures was not necessary for the attainment of the specific objective, and the Commission has not indicated why it was deemed to be

necessary for that particular purpose and has not even said that it was deemed to be necessary therefor.

Of course it is perfectly feasible, as well as in accord with the structure of our dual form of government, to confine the Commission's control over the liquidation to the steps which really are needed to accomplish the distribution of the stock, while the other steps, including the retirement of the debentures, are carried out in accordance with the laws of the State of Maryland, under which laws Power was organized and now functions.

In stating above that there has been no finding or holding to the effect that the action taken with respect to the debentures was necessary in order that Power should cease to be a holding company in the system, we have not overlooked the fact that the Commission referred to the Plan for the retirement of the debentures as "being necessary to effectuate the provisions of said section" (meaning the section in which the great-grandfather clause is contained) "and to enable Power to liquidate and dissolve in accordance with our order of March 20, 1941". But that finding does not meet the requirements of the great-grandfather clause, which is the clause of "said section" under which the dissolution order was made. In the dissolution order (R. 115) the Commission set forth its finding that the action directed thereby "is necessary and appropriate for the purpose of bringing about compliance with the second sentence of Section 11(b)(2)", the great-grandfather clause. Inasmuch as the dissolution, as we have shown above, is necessary for the purpose of the great-grandfather clause only to the extent that certain steps in the dissolution proceedings may effectuate the distribution of the top subsidiary's common stock held by Power and thus attain the objective of the clause, it is clear that when certain action in the dissolution proceedings (the retirement of the debentures, for instance) is proposed to the Commission, an order directing such action to be taken cannot be sustained without a finding by the Commission that the action is necessary for the attainment of the objective. Certainly the provision of the great-grandfather clause requiring a finding that the

proposed action is "necessary in order that such holding company shall cease to be" a great-grandfather holding company is not met by a statement that the proposed action is "necessary to effectuate the provisions of said section" (without stating that it is necessary specifically for the purpose of the great-grandfather clause) "and to enable Power to liquidate and dissolve in accordance with our order of March 20, 1941".

But, entirely apart from the contention made above as to the insufficiency of the Commission's statement just quoted, we contend (a) that its statement that the action concerning the debentures was "necessary * * * to enable Power to liquidate and dissolve * * *" is not in accordance with the facts (see Point I in the accompanying brief); (b) that the facts as to necessity are jurisdictional, since the statute withholds from the Commission power to take or to direct action which is not necessary, and (c) that with respect to such facts the independent judgment of the reviewing court is to be exercised (see the last paragraph of Subdivision VI on p. 21 below).

The Commission and the court below apparently thought, mistakenly, that it was the intention of Congress to authorize the Commission, in a proceeding under the great-grandfather clause in which a holding company is in process of liquidation and dissolution by order of the Commission, to supervise every step in the liquidation and to take whatever action the Commission deems to be fair and equitable even though such action is not found by the Commission or shown by the record to be necessary to attain the objective of that clause. An unwarranted assumption underlies that misconception, namely, that Congress disregarded the limitations inherent in the dual nature of our government and sought to authorize a greater invasion by the Commission of the area reserved to the States than would be necessary to attain "a legitimate end, the effective execution of the granted power to regulate interstate commerce."

If there were doubt as to the intention of Congress with respect to such rights as those represented by these

debentures, the fact that the rights are of a local character would be an indication, in itself, that Congress did not intend to reach them. *Wickard v. Filburn*, 317 U. S. (1942); *Fed. Trade Com. v. Bunte*, 312 U. S. 349 (1941).

IV

As to Question 2: Was not the Commission's Action in Contravention of the Constitution?

Even if it were assumed that the action taken with respect to the debentures was within the limits of the power which Congress intended to give to the Commission, still we are confronted with the all-important question whether the exercise of such power is in contravention of the Constitution or the basic principle mentioned in Question 2. Two questions are involved, the first being whether, in the absence of any showing of relationship between the rights represented by the debentures and interstate commerce, the Commission, as an agency of the national government, may deal with the debentures. That question was not discussed in either the opinion of the Commission or the opinion of the court below.

In view of the recognized limits of the "commerce power" conferred upon the national government by the Constitution, Congress took care to limit the scope of the Act to enumerated problems and evils "connected with public utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce" and declared it "to be the policy of this title, in accordance with which all the provisions of this title shall be interpreted" to meet those problems and eliminate those evils (Sec. 1(c)). In the enumeration of such problems and evils there is nothing which, by any stretch of the imagination, can be deemed to include such rights as those of the debentureholders. Neither Power nor the Commission nor the court below has suggested that there is anything of this kind in the enumeration.

Nor has there been any finding or holding as to the relation, if any, between the rights of the debentureholders and interstate commerce, or as to the place of interstate commerce in this situation. Unless the Commission and the court below ignored entirely the limitations of the commerce power (which presumably they would not do) they must have assumed that interstate commerce was involved in the situation somewhere; but they made no reference to it. Where is the boundary line, and on which side of the line are the debentures? Are the debentures within the "limits of permissible regulation", to use the phrase used by this Court in its analysis of the Act in *Electric Bond & Share Company v. Securities and Exchange Commission*, 303 U. S. 419, 441? Having obtained no answer to these questions from the Commission or the court below, the debentureholders are looking to this Court for the answers.

Strange as it may seem, neither the Commission nor the court below made any reference to the limits of the national commerce power under our dual system of government. Federal legislation of this character cannot be construed without regard to the implications of our dual system of government, as this Court said with reference to the Fair Labor Standards Act in *Kirschbaum Company v. Walling*, 316 U. S. 517, 520, decided June 1, 1942.

The other part of Question 2 is: Did the Order violate valuable contract rights of the debentureholders in contravention of the Fifth and Tenth Amendments of the Constitution and the basic principle mentioned above?

These factors are to be borne in mind: (1) The debentures, in so far as they provided for the payment of principal on dates certain and the payment of interest at a specified rate to the maturity dates, gave the debentureholders the right to insist that the payment of principal should be made only at maturity and that interest should be paid until then—as the court below stated in its opinion (R. 323). (2) The debentures and the agreements clearly show an intention to protect the debentureholders from being deprived of their debentures before the stipulated matu-

rity without being given compensation for such deprivation—save only in the event of default; there is no intimation in the debentures or the agreements that under some circumstances other than default the debentureholders would not have such protection. (3) The debentureholders contend that, even though it be assumed that the provision in the debentures calling for payment of redemption premiums by the obligor is not applicable in the present situation, where the retirement of debentures is required by governmental order, still the debentureholders are entitled to payments equivalent to redemption premiums in lieu of future interest payments and as compensation for the premature termination of their investments. Those are the “valuable contract rights” referred to in the question.

The “basic principle” referred to in the question is that which restricts the invasion of antecedent lawful contracts by Federal or State action. It is one of the “great first principles of the social compact.” (*Calder v. Bull*, 3 Dall. 386; *Continental Bank v. Rock Island Ry.*, 294 U. S. 648, 680 (1935); *Highland v. Russell Car Co.*, 279 U. S. 253, 261 (1929).) The debentures were antecedent lawful contracts, and the petitioners contend that by the order their rights under the contracts were unlawfully invaded. They also contend that the order was an invasion of the authority of the States in contravention of the Tenth Amendment, which excludes from the domain of the national government such an internal affair of the States as the disposition of the debentures. The petitioners contend further that the order was in contravention of the Fifth Amendment in that it (a) was unreasonable, arbitrary and capricious and (b) had no real and substantial relation to the object sought to be attained by the great-grandfather clause, namely, to cause Power to cease to be a holding company in control of the company next below it in the system and its subsidiaries.

Undoubtedly the points involved in Question 2 are of great importance and ought to be decided by this Court. They were not discussed in the opinion of the court below.

So far as we have been able to ascertain, they have not been decided by any court in any situation similar to the case at bar.

V

As to Question 3: Was not the Order Invalid for Lack of Specific Findings as to Jurisdictional Facts?

The question might be phrased as follows: Can the Commission lay an adequate foundation for the exercise of control over contracts which have a local character and are not claimed to be in interstate commerce by merely characterizing the action of the Commission as "necessary" to effectuate the provisions of a certain section of the Act, without specifying how or in what respect it is necessary for a particular purpose specified in such section (specified in the great-grandfather clause in the present instance) and without making findings (stating the basic facts and reasons) that the matters which the Commission seeks to dispose of are within the limits of the power of the national government as fixed by the Constitution?

The importance of such a question as that is obvious. (*Securities and Exchange Commission v. Chenery Corp.*, 317 U. S. ; adv. opinions; decided Feb. 1, 1943.)

VI

As to Question 4: Did the Dissolution Order Affect the Standing of the Debentureholders to Question the Commission's Power to deal with the Debentures?

As a result of the view taken by the court below with respect to the issues presented by questions numbered 1, 2, 3 and 4, the debentureholders have not yet had a judicial decision as to the Commission's power to deal with the debentures or with respect to the questions arising in connection with the commerce power or other constitutional questions. Such decision was what the petitioners sought through the review proceeding in the court below.

The court below observed that the Act authorizes the Commission to cause necessary action to be taken, and it held that the Act gave the Commission power, subject to the review provided for its orders, to decide what was necessary in each instance and, further, that the debentureholders are in no position to question the necessity of a plan which provides cash for them "to the full extent of the contract in the bond" (R. 323). The court then said, in effect (R. 324), that the continued existence of Power was needed for the carrying out of its contract with the debentureholders and that this continued existence was made impossible by the dissolution order of March 20, 1941. This was followed by the statement: "So much being established, we have no occasion to discuss any more fully the Commission's creation or powers from a constitutional or other viewpoint." Thus the court failed to pass on the jurisdictional or the constitutional questions and held, in effect, as we understand its opinion, that the Commission may take or cause to be taken such action as the Commission deems to be necessary in connection with the dissolution and the Commission's authority so to act cannot be challenged from a constitutional or other viewpoint.

Under that ruling the debentureholders would never have an opportunity to obtain a court decision on the Commission's power. The debentureholders would have had no standing to obtain a review by any court before the Commission took some action by which the debentureholders were aggrieved—since the Act limits those who may obtain a court review to persons or parties "aggrieved". The debentureholders were not aggrieved by the making of the dissolution order because at that time the Commission left itself free to determine what should be done about the debentures (R. 103, footnote 8). It is obvious that so long as the Commission had not decided that the redemption premiums should not be paid the debentureholders were not aggrieved.

Neither the Trustee nor any of the debentureholders were parties to the proceeding in which the dissolution

order was made. No judicial review of that order was sought. The only opportunity which the Trustee or the debentureholders could have had thus far to obtain a court decision on the questions here referred to was the opportunity which they anticipated through the review by the court below.

It appears that the court below disregarded the rule requiring it to act *de novo*—that is, to reach its own independent judgment on the facts and on the law—when confronted with the question whether the action of an agency such as the Commission is repugnant to the Constitution, or whether interstate commerce is involved, or any other question of constitutional right or power, regardless of how the question arises. (*Crowell v. Benson*, 285 U. S. 22, 56-60 (1932) and cases there cited; *Vom Baur's Federal Administrative Law*, Sec. 262.)

VII

As to Question 5: Were the Debentureholders Precluded from Questioning the Commission's Power because in the Opinion of the Court below They Were Awarded All They Were Entitled to?

Assuming that the court below held, as we understand it did, that the Trustee and the debentureholders are precluded from questioning the jurisdiction of the Commission because in the opinion of the court below the debentureholders were awarded all they were entitled to, this is an error which should not remain uncorrected. The court cited no authority. We know of none. If an administrative body takes action which has the effect of depriving persons of certain rights which they claim, and the claimants, both in the proceeding before the administrative body and in the judicial review of its decision, make the objection that the administrative body is without power or authority to deal with such rights, is it not true that a decision on that objection should be rendered by the reviewing court wholly apart from the question whether the claimants are entitled to the rights which they assert?

VIII

**As to Question 6: Is Substantial Performance by Power of its Obligations
under the Debenture Contracts Excused because of the
Dissolution Order?**

The contractual obligations under consideration here are nothing more, or less, than the promises of a corporation to pay interest on money advanced to it. At the time the contracts were made there was complete performance on the part of the promisees, all of the advances having been made at that time.

The court below has held that when literal performance of a promise by a corporation to pay interest on money advanced to it is prevented by a governmental order requiring the dissolution of the corporation the promise is discharged and the future interest payments excused—even though, as the court concedes, substantial performance is not prevented. We have found no precedent for this holding and we believe there is none.

It is our belief that the effect (undoubtedly far-reaching) which this holding, if allowed to stand as a precedent, would have upon the rules of law applied to promises to pay money such as those contained in the debentures constitutes sufficient reason for immediate review by this Court; and there is the further reason that the holding evidently is erroneous.

We point out the errors here. As the basis of its holding the court made the assumption that the debenture contracts contemplated as indispensable the continued existence of the obligor (R. 324). In making that assumption the court committed two errors. First: Its assumption was contrary to reality in that in the case of a contract merely to make money payments the existence of the promisor never is deemed to be indispensable to performance. Obviously such payments could be made by others—for instance, by a successor corporation in a case where the promisor is a corporation. Second: In making that assumption the court overlooked certain provisions of the debenture contracts which disclose that the parties

had in mind that the payments might be made by a successor corporation, and so could not have contemplated as indispensable the continued existence of the original obligor. (See Article Ten of the debenture bond agreement dated January 1, 1923; R. 239, 240. There is an identical article in the other debenture agreement, which is dated November 1, 1925, and which by stipulation of the parties was omitted from the printed record with the exception of the portion appearing on page 241, but which is in the unprinted transcript now on file in this Court.)

It is interesting to note that the original obligor in the agreement of 1923 was United Light and Railways Company, which was a Maine corporation and was succeeded by Power under this Article Ten and thereupon was dissolved (p. 4 of the "Report of the Public Utility Division" dated November 27, 1940, which is Document 3 in the unprinted transcript). That circumstance indicates the importance of Article Ten in the minds of the parties. If we needed further confirmation of the conclusion that the parties actually anticipated that the original obligor might be dissolved without terminating the debenture contracts and therefore could not have contemplated as indispensable the continued existence of the original obligor, it would be found in the fact that in drafting the agreement of 1925 Power, which by that time had become the successor corporation under the agreement of 1923, and The New York Trust Company, which was the Trustee under both agreements, took care to incorporate in the later agreement Article Ten of the earlier agreement in order to facilitate the succession of another corporation in the event of the dissolution of Power—not "unforeseen".

For its holding that the future interest payments were excused, the court gives as a reason that "the venture has been frustrated" (R. 324). Evidently, the court intended to apply the so-called frustration rule or doctrine, which is applicable in certain cases. But it is not applicable in this case, because (to mention one of two or three reasons) the rule is limited to bilateral contracts, and the debentures are unilateral contracts, having been wholly performed by the promisees when the contracts were made (R. 181).

The court below pointed out (R. 324) that the reason for excusing such payments was not that performance of the promise to make them had been made impossible by the dissolution order, since (as the court said) substantial performance was possible because the obligor was in a position to make payments in the amount of the redemption premiums as the equivalent of the future interest payments. Undoubtedly that statement is correct. But, in the face of that statement, the court cited as authorities for the application of the frustration rule certain decisions of this Court announcing a rule for cases of impossibility. The court cited no other authority in support of the application of the frustration rule except two sections of the Restatement of Contracts which are not applicable.

Furthermore, the court below failed to give due weight to these facts: That the Commission was dealing with Power's holding company system and not with Power independently of the system; that the business of the system, in which the capital received from the debentures was used, is not being discontinued but is to be carried on in entirety by the system after its simplification by the dissolution of Power; and that the capital so received and used in the business of the system could have been left in the system after and notwithstanding the dissolution of Power, the debentures being assumed by the top subsidiary, which is to be the successor of Power as the top company. That being so, it is evident that "the venture" in question is the business of the system and that it has not been "frustrated".

In our attempt to make this statement concerning Question 6 reasonably brief, we fear we may have failed to make it adequate. We have endeavored to give a more adequate presentation under Point V of the accompanying brief. We believe it is not an overstatement to say that it appears from the presentation in the brief that Question 6 has been decided by the court below in a way probably—to say the least—in conflict with the applicable decisions of this Court.

IX

As to Question 7: Are not the Debentureholders Entitled to Payments in the Amount of the Redemption Premiums?

Power is now able to make payments in the amount of the redemption premiums in lieu of the future interest installments. Question 7 is concerned with the right of the debentureholders to receive such premium payments now in lieu of future interest installments. The grounds on which the right is claimed may be summarized as follows:

The debentureholder's right to receive the principal on the specified maturity date, but not before, was unqualified and "as sacred as to receive it at all" and his right to receive the semi-annual interest payments was equally unqualified and inviolable.

The debentures and the debenture agreements under which they were issued clearly show an intention to protect the debentureholders from being deprived of their debentures and the future interest payments before the stipulated maturity without being given compensation for such deprivation—save only in the event of default; there is no intimation in the debentures or the agreements that under circumstances other than default the debentureholders would not have such protection.

There being no justification for depriving the debentureholders of their rights mentioned above in a manner not provided for in the debentures, that is, without the payment to them of compensation for such deprivation, such compensation must be given.

If the debenture provisions specifically requiring the payment of redemption premiums in the amount of nine per cent of the principal are deemed to be inapplicable in the present instance, still the measure of the compensation to be given to the debentureholders would necessarily be nine per cent of the principal, since that is the measure agreed upon between the obligor and the debentureholders and there is not in the record a factual basis for any other measure.

X

As to Question 8: Was not the Plan Unfair and Inequitable with Respect to the Debentureholders?

The Plan approved by the Order is unfair and inequitable with respect to the debentureholders, not merely for the reason that it terminates their investments without compensation for premature termination, but also for the reason (set forth more fully in the accompanying brief) that in doing so it fails to give fair and equitable treatment to the debentureholders in relation to the stockholders and fails to give the debentureholders treatment similar to that given to other security holders of Power which are similarly situated. In dealing with the rights of the debentureholders the liquidation is treated as a matter of Power only, and not as a matter of the system, which it is; whereas in dealing with the other security holders the liquidation is treated as a system matter, their investments being taken care of within the system. For instance, Power's First Lien and Consolidated Mortgage Bonds, instead of being retired without compensation to the holders for the premature termination of their investments, were assumed by another company in the system, some of the bonds so assumed being contemporaneously redeemed at the full redemption price, which included premiums (R. 138). This discrimination was not referred to in the Commission's findings and opinion or in the opinion of the court below.

XI

As to Question 9: Should There Not Have Been a Single, Comprehensive Plan?

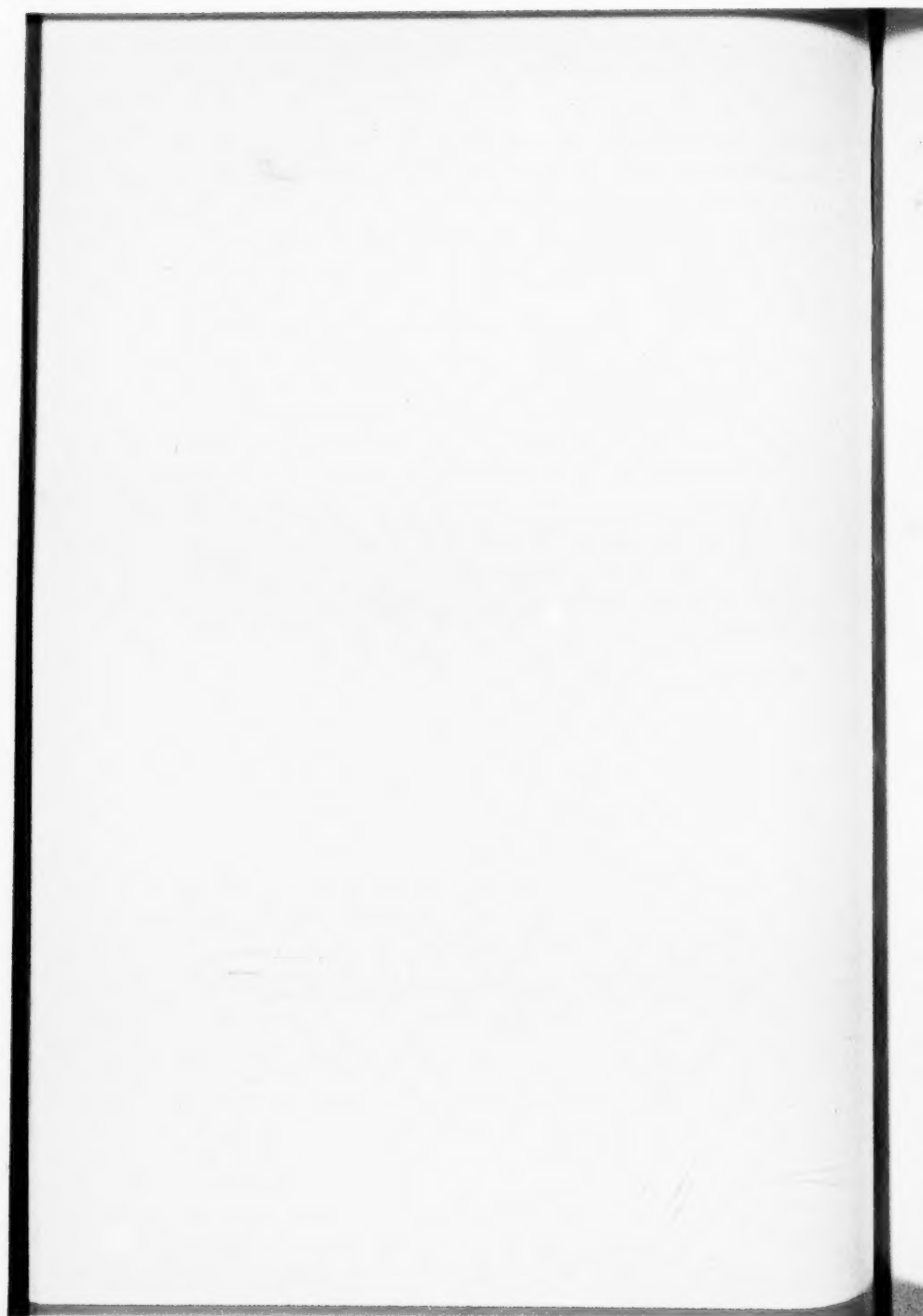
The above-mentioned discrimination against the debentureholders may have been due in part to the lack of a single comprehensive plan. If each step in the liquidation had been set forth in advance in one complete plan, the discrimination would have been apparent at once. As it was, the First Lien and Consolidated Mortgage Bonds transaction was approved by the Commission and com-

pletely carried out before the Plan for the retirement of the debentures was presented. So far as the stockholders are concerned, it is not known even yet what action the Commission will take. It has under advisement a plan which has been presented by Power and under which all of Power's stockholders would share in the distribution of Power's holdings of the common stock of the top subsidiary. This is an illustration of the complications which may arise if in cases of this nature the practice of having a series of plans instead of a single comprehensive plan is followed. The importance of a decision by this Court regarding such practice is obvious.

WHEREFORE the petitioners pray that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit entered on December 4, 1942 affirming the Order of the Securities and Exchange Commission.

February 26 , 1943.

BEN LEROY STOWELL,
IRWIN L. TAPPEN,
HOWARD A. MARX,
For Petitioners.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1942

THE NEW YORK TRUST COMPANY, as the Trustee under the
Debenture Agreements between it and THE UNITED
LIGHT AND POWER COMPANY; MARY A. WALDRON, FRED-
ERICK H. BRUNNER, AMERICAN EQUITABLE ASSURANCE
COMPANY OF NEW YORK, KNICKERBOCKER INSURANCE
COMPANY OF NEW YORK, NEW YORK FIRE INSURANCE
COMPANY, MERCHANTS AND MANUFACTURERS INSURANCE
COMPANY OF NEW YORK, and AMERICAN RESERVE INSUR-
ANCE COMPANY,

Petitioners,

against

SECURITIES AND EXCHANGE COMMISSION and THE UNITED
LIGHT AND POWER COMPANY.

BRIEF ACCOMPANYING PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

Jurisdiction

The petitioners seek a review by this Court, upon cer-
tiorari, of a decree of the United States Circuit Court of
Appeals for the Second Circuit affirming an order of the
Securities and Exchange Commission (hereinafter called
the Commission) made in a proceeding under the so-called
great-grandfather clause of the Public Utility Holding
Company Act of 1935 (hereinafter called the Act). By
virtue of a provision in the last sentence of Section 24(a)
of the Act, under which section the court below made its
decree of affirmance, such decree is "subject to review by

the Supreme Court of the United States upon certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (U. S. C. Title 28, Sections 346 and 347)."

Opinions of the Commission and of the Court Below

The opinion and findings of the Commission appear on pages 294-315 of the Record. The opinion of the court below appears on pages 320-325 of the Record and has been reported in 131 F. (2d) 274—advance opinions.

A statement of the facts will be found on pages 2-5 of the foregoing petition under the heading "*Statement of the Matter Involved*". We believe it is not necessary to repeat the statement here.

The Purpose, Policy and Scope of the Act

The Act contains a series of regulations to be enforced by the Commission "to meet the problems and eliminate the evils . . . connected with public utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce" (Sec. 1(c)). Section 1 declares that public utility holding companies are affected with a national public interest when they build up and maintain control over operating companies by the use of the mails and channels of interstate commerce. Accordingly, in this Act Congress sought to prevent the evils and abuses found in a report of the Federal Trade Commission to exist in the use of the mails and the channels of interstate commerce.

The evils and abuses here referred to are set forth in Section 1(b) of the Act, those connected with securities and investors therein being classified and described in subparagraph (1) of paragraph (b) and covering the follow-

ing matters: uniform standard accounts; the issuance of securities without the approval or consent of States; the issuance of securities upon the basis of fictitious or unsound asset values or of paper profits, or in anticipation of excessive revenues; the issuance of securities by a subsidiary public-utility company under certain circumstances.

The policy of the Act, "in accordance with which policy all the provisions of" the Act "shall be interpreted", is set forth in paragraph (c) of Section 1, the policy being "to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce". The words last quoted, making the connection with interstate commerce the criterion, show that the Act was deemed by Congress to be an exercise of its constitutional power to regulate interstate commerce.

The Act is addressed to the future, not to the past, and was not intended to interfere with antecedent contract rights of the nature of those represented by the debentures. This is shown under Point IV below.

In *Electric Bond & Share Company v. Securities and Exchange Commission*, 303 U. S. 419, the validity of the Act in its entirety was challenged, as well as the validity of the provisions requiring holding companies to register and furnish information. This Court sustained the validity of those provisions and, holding that they were separable, found it unnecessary to pass upon the validity of any of the other provisions of the Act.

The Contract Rights of the Debentureholders

Each debentureholder, by virtue of his contract with Power, had the right to retain his debentures and to draw interest thereon until the stipulated maturity date, which right was valuable and was limited only by provisions of the debentures and the debenture agreements permitting redemption before such date upon payment of a premium as compensation to the debentureholders for the termina-

tion of their investments before such date. *Missouri K. & T. Railway Company vs. Union Trust Company*, 156 N. Y. 592, 599 (1898); *Harnickell vs. Omaha Water Company*, 146 App. Div. 693, 131 N. Y. Supp. 489 (affirmed in 1913 on the opinion below, 208 N. Y. 520); *Manufacturers Trust Co. vs. Roanoke Water Works Co.*, 172 Va. 242, 1 S. E. (2d) 318 (1939).

Neither in the debentures nor in the debenture agreements was there any provision that would give the obligor a right to liquidate the debt prior to maturity without payment of a premium (R. 306, footnote 11). Only in the event of default by the obligor and acceleration of maturity by the Trustee acting on behalf of the debentureholders might the debentures be retired without the payment of redemption premiums, under any provision of the debenture contracts (R. 301, 302).

The court below seems to have been substantially in accord with this statement of the contract provisions (R. 323); but it deemed those provisions, along with all of the other provisions of the contracts, to be without effect, holding that the contracts are "no longer binding" because they "contemplated the continued existence" of the obligor, and Power, the obligor, is to go out of existence by order of the Commission.

ARGUMENT

The purpose of this brief is to present principal points and authorities which may be helpful to the Court in its consideration of the reasons for the allowance of the writ set forth in the petition. The purpose is not to restate the reasons or to present a complete argument on the issues. The matter which we here present relates to Questions 1, 2, 3, 6, 7 and 8 set forth in the petition.

POINT I

The Commission's Order directing the retirement of the debentures is not within the statutory power of the Commission, for the reason that the power which the Act purports to confer upon the Commission in proceedings under the great-grandfather clause is limited to action "necessary" to attain the objective of the clause and the action directed by the Order is not necessary for that purpose.

This point relates to Question 1 in the petition.

The objective of the great-grandfather clause, as applied to Power, is that Power shall cease to be a great-grandfather holding company, and it is to be attained by the distribution among Power's stockholders of its holdings of the common stock of the top subsidiary, thus removing Power from the system. As we point out on pages 10 to 14 of the petition, the action directed by the Order for the retirement of the debentures is not necessary to the attainment of the objective, not being in the line of the steps which lead to such stock distribution, and since it is not necessary it is not within the statutory power of the Commission. The court below, instead of discussing the requirements of the great-grandfather clause under which Power's removal from the system is

to be accomplished, referred to other clauses of the Act, saying:

“It was the duty of the Commission under Sections 11(b) (2) (d) and (e) of the Act to supervise the carrying out of its order of dissolution and to that end it properly entertained applications for its approval of the steps proposed to be taken. How these bonds should be dealt with was one of the questions requiring decision and as such was clearly within the proper scope of a plan to be submitted to the Commission under above subsection (e).”

It is plain that neither subsection (d) nor subsection (e) has the importance in the present dissolution proceeding which the court assigned to them. It cannot be that subsection (d) is applicable, for by its terms it is limited to court proceedings initiated by the Commission for the enforcement of its orders. As to subsection (e): It seems to be inapplicable to this dissolution proceeding, and furthermore, even if it were applied to this proceeding, that would be done only for the purpose of enabling Power to comply with the great-grandfather clause and then only to the extent necessary to attain the objective of that clause. We think that is the reasonable interpretation of subsection (e). The reason we say that the subsection seems to be inapplicable to this proceeding is that it seems to us to be designed to apply only to the voluntary submission of plans to the Commission by companies in holding-company systems, under general rules or regulations or a general order of the Commission providing for such voluntary submission. For brevity's sake we leave that statement without elaboration and now state why subsection (e) if applied to this proceeding would be applied only for the purpose of enabling Power to comply with the great-grandfather clause and then only to the extent necessary to attain its objective.

It should be noted that the proceeding in which the dissolution order was made was instituted under Section 11(b) (2) by order of the Commission (R. 93) and there-

after was consolidated with an application previously filed voluntarily by Power for the approval of a plan of recapitalization under subsection (e) (R. 94). Consideration of the plan submitted under subsection (e) was deferred and the hearings were confined to the consideration of "methods for bringing about compliance with the great-grandfather clause" (R. 96). With this situation in mind, the Commission said (R. 305, footnote) that the fact that Power's application for approval of its Plan for the retirement of the debentures was designated as being filed under subsection (e) was "not of controlling importance" and further: "It was filed as permitted by our order" (the dissolution order) "pursuant to Section 11(b)(2), and it is Section 11(b)(2), as applied to the particular holding-company system, that is the moving force". To be more precise, it is the great-grandfather clause in Section 11(b)(2) that is the moving force.

It is plain therefore that if subsection (e) is given any effect in this instance, it is only in subordination to the great-grandfather clause; so that even if the Plan could be treated as having been submitted by Power under subsection (e) it would necessarily be deemed to have been submitted for the purpose of enabling Power to comply with the great-grandfather clause, the requirements of that clause would control, and the first question presented would be the very question now under consideration, namely, whether the Plan was necessary in order to enable Power to comply with the great-grandfather clause, which question is fully discussed in the petition and therefore need not be discussed here.

Another question to be considered here is whether the Plan for the retirement of the debentures was necessary in order "to enable Power to liquidate and dissolve in accordance with" the dissolution order. That question is raised by the Commission's reference to the Plan as being necessary for such purpose (R. 315; findings and opinion). Although for reasons given in the petition (p. 14), we believe that statement is insufficient as the basis for the Order, yet apart from that, the petitioners contend that, at the

least, they are entitled to have all of the facts and possibilities pertinent to the statement considered by this Court upon review, such facts being jurisdictional facts upon which the independent judgment of a reviewing court may be exercised; and the petitioners can point out certain pertinent facts and possibilities which evidently were not taken into account by the Commission or the court below. The right of a reviewing court to reach its own independent judgment in such cases is discussed on page 20 of the petition. This is the situation:

The debenture agreements made provision for the transfer of all of the property of the obligor to a successor corporation and for the dissolution of the obligor upon the assumption of the debenture contracts by the successor corporation. In the present instance all of the property of the obligor (Power) is to be transferred to a successor corporation which will then be the top company in the system in the place of Power, and thereupon Power is to be dissolved. Under these circumstances, it cannot be maintained that the retirement of the debentures is necessary to enable Power to liquidate and dissolve unless it appears that it is impossible or impracticable for the successor corporation to assume the debenture contracts. The Commission (R. 300, 301) mentioned obstacles in the way of such assumption and stated that payment of the debentures could not in the present instance be avoided merely by having them assumed by some other company of the system. But there are certain pertinent facts and possibilities not mentioned by the Commission or the court below which, we contend, should be considered by this Court in the exercise of its own independent judgment as to the jurisdictional facts. For instance: In the course of complying with various provisions of the Act, the system is being transformed into a great integrated operating public utility system. It now includes properties in several Western States. Outlying properties which are deemed not to be susceptible of integration with the properties in those States are being sold and the proceeds are being used in the purchase of new properties which are deemed to be

susceptible of integration (see p. 4 of S. E. C. Holding Company Release 3666, July 17, 1942). Under these circumstances, is it not likely that there are many opportunities for investing money in new properties and that if the new top company had assumed the debentures and taken over the cash which Power has used for the retirement of the debentures, such cash could have been invested, together with the proceeds of the properties sold, in new properties susceptible of integration? The petitioners contend that they are entitled to have those facts and possibilities considered by this Court. They were not mentioned by the Commission nor by the court below. That court mentioned, but did not discuss, the petitioners' contention concerning the assumption of the debenture contracts by the successor corporation.

POINT II

The Commission's action (whether or not the Act purports to authorize it) was in contravention of the Constitution and the basic principle (underlying the Constitution) which strictly limits the power to impair or destroy the lawful contracts of citizens.

This point relates to Question 2.

1

The basic principle here referred to is embodied in the statement in *Calder v. Bull*, 3 Dall. 386, 388, to the effect that among other acts which Congress could not pass without exceeding its authority was "a law that destroys or impairs the lawful private contracts of citizens". In *Continental Bank v. Rock Island Railway*, 294 U. S. 648 (1935) the Court pointed out at page 680 that the "broad reach of that statement has been restricted", but it said that "the principle which it includes has never been repudiated,

although the extent to which it may be carried has not been definitely fixed”.

It must be presumed that in passing the Act Congress was guided by this fundamental principle, one of “the great first principles of the social compact” (*Calder v. Bull, supra*), and intended and expected that the Commission would be guided by that principle in all proceedings under the Act. This appears clearly from the provisions of Section 26 of the Act for the protection of the holders of lawful contracts and obligations. (See the statement regarding that section at page 15 below.)

2

The petitioners contend further that the Order for retirement of the debentures was in contravention of the Fifth Amendment in that it (a) was unreasonable, arbitrary and capricious; and (b) had no real and substantial relation to the objective of the great-grandfather clause, namely, to cause Power to cease to be a holding company in control of its system. *Treigle v. Acme Homestead Association*, 297 U. S. 189, 197 (1936); *Nebbia v. New York*, 291 U. S. 502 (1934).

How can it fairly be said that the Order is not unreasonable and arbitrary and capricious when it bears no apparent relation to the evils which the Act seeks to eliminate? The evils are set forth in Section 1(b) of the Act. It has not been contended by any party hereto or by the Commission or the court below that any of these evils exist in connection with the debentures or are involved in any way in this proceeding.

How can it fairly be said that the Order had a real and substantial relation to the object of causing Power to cease to be a holding company in control of its system, which was “the object sought to be attained”—to take a phrase from the opinion in the *Nebbia* case? We have shown in the petition (pp. 12, 13) that the order had no such real and substantial relation.

The petitioners contend also that the Commission did not observe the limitations of the commerce power. The decisive factor in that respect is the relation of the debentures and the rights represented thereby to the granted power of Congress to regulate interstate commerce. If in a substantial way they interfere with or obstruct the granted power, they may be reached by Congress, although they are local in character and although they may not be regarded as being in commerce. *Wickard v. Filburn*, 317 U. S. (adv. opinions; decided November 9, 1942); *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 119 (1942); *United States v. Darby*, 312 U. S. 100 (1941). If they do not have that relation to the granted commerce power, they cannot be reached by Congress; and it has not been contended by any party hereto or by the Commission, or the court below, that they had such relation, or any relation, to the commerce power.

In the absence of such relation to the commerce power, the debentures and the rights represented thereby remain within the domain of State power and are among the internal affairs of the States, and therefore are not within the power of Congress or the Commission. *Schechter Corporation v. United States*, 295 U. S. 495, 544-550 (1935). Such matters are excluded from the domain of Congress by the Tenth Amendment, which expressed what already appeared from the proceedings of the framers of the Constitution and from the "natural construction of the original body of the Constitution" (*Kansas v. Colorado*, 206 U. S. 46, 89-90) including the commerce clause itself, which establishes the distinction between commerce "among the several States" and the internal concerns of a State (the *Schechter* case, *supra*, p. 550).

In this connection *Northern Securities Company v. United States*, 193 U. S. 197 (1904), a leading anti-trust case, should be considered.

Northern Securities Company had control over Northern Pacific Railway Company and Great Northern Rail-

way Company through the ownership of stocks of those companies. In the decree of the Circuit Court it was found that the stocks were acquired and held by Northern Securities Company by virtue of a combination or conspiracy in restraint of interstate trade and commerce. The decree enjoined Northern Securities Company from voting the stock or exercising any control over the Railway Companies, and it enjoined those companies from paying dividends to Northern Securities Company and from permitting that company to exercise any control over the Railway Companies.

The Supreme Court affirmed the decree. It said at page 346:

“In short, the Court may make any order necessary to bring about the dissolution or suppression of an illegal combination that restrains interstate commerce. All this can be done without infringing in any degree upon the just authority of the States.”

It is important to note that, although the Circuit Court took action designed to bring about the dissolution of the “combination”, it refrained from making an order for the dissolution of the offending company itself (Northern Securities Company) and that the Supreme Court, in approving the action of the Circuit Court, said at page 346: “The Federal Court may not have power to forfeit the charter of the Securities Company”; and said further that such matters “are to be regulated by the State which created the company”.

So in our case it may be conceded that the Commission had power to make any order necessary to bring about compliance with the great-grandfather clause by causing Power to cease to be a great-grandfather holding company—for instance, an order (similar to the order in the *Northern Securities Company* case) directing Power to divest itself of control over its subsidiaries; and it is to be noted that when the Commission made its order for the dissolution of Power it made it for the declared purpose of bringing about compliance with that clause, for the ac-

complishment of which purpose it was sufficient for Power to dispose of the common stock of the top subsidiary. However, when the Commission went beyond such declared purpose and made the order for the retirement of the debentures, it went beyond the limits of the commerce power and assumed the regulation of matters that "are to be regulated by the State which created the company".

POINT III

The Order for the retirement of the debentures is invalid for failure of the Commission to make specific findings (stating the basic facts and reasons) that the matters which it sought to dispose of by the Order were within the jurisdiction or power of the Commission and that it was necessary for the Commission, in order to bring about compliance with the great-grandfather clause, to dispose of those matters as it sought to do by the Order.

This point relates to Question 3.

Although, as pointed out under Point II above, the actual relation of the debentures and the rights represented thereby to the commerce power of Congress is the decisive factor in determining whether the making of the Order was within the limits of the power of the national government as fixed by the Constitution, the Commission made no finding on that point. And although the Order was made in proceedings under the great-grandfather clause only, which clause limits the power of the Commission to action necessary to attain the objective of the clause, the Commission made no finding that the action was necessary for that particular purpose. Moreover, although the Commission referred to the Plan approved by the Order as being necessary to effectuate the provisions of the section in which the great-grand-

father clause is contained and "to enable Power to liquidate and dissolve" in accordance with the dissolution Order, it did not specify how or in what respect it was necessary for those purposes and it did not state the basic facts and reasons for that conclusion.

From the foregoing statement, it is clear that essential findings are absent and that the Order is without adequate support (*Securities and Exchange Commission v. Chenery Corp.*, 317 U. S. (adv. opinions; decided Feb. 1, 1943); *Florida v. United States*, 282 U. S. 194 (1930); *Atchison Railway v. United States*, 295 U. S. 193 (1934); *Federal Trade Commission v. Klesner*, 280 U. S. 19 (1929)).

POINT IV

The Act is addressed to the future, not to the past, and was not intended to interfere with antecedent contract rights of the nature of those represented by the debentures.

The Act must be construed in accordance with the "first rule of construction", namely, that legislation is to be construed as addressed to the future, not to the past, and will not be given a construction or operation which would interfere with antecedent rights unless such be the "unequivocal and inflexible import of the terms and the manifest intention of the legislature". *Union Pacific R. R. Co. v. Laramie Stockyards*, 231 U. S. 190, 199 (1913).

In the provisions of the Act there is no such "unequivocal and inflexible import" with respect to antecedent contract rights of the nature of those represented by the debentures nor can a "manifest intention" of Congress to interfere with such rights be gathered therefrom; on the contrary, certain provisions imposing limitations upon the operation of the Act with respect to antecedent contract rights show conclusively that rights of the nature of those represented by the debentures are intended to be and are excluded from the operation of the Act.

The Act specifies precisely (section 26) to what extent antecedent contracts (and subsequent contracts as well) are to be void and contains a provision for the protection of the holders of antecedent (and subsequent) loans, extensions of credit, debts, obligations and liens.

These provisions obviously were intended to protect innocent creditors, that is, persons who had acquired debts, obligations or loans in good faith for value and without actual knowledge of the violation of any provision of the Act or any rule or regulation affecting the legality of such debts, obligations or loans. In this case there has been no claim that the debentureholders did not acquire their debentures in good faith for value, or that any of them had knowledge of the violation of any provision of the Act or any rule or regulation occurring by reason of the existence of their debentures. It has not even been intimated or suggested that any such violation ever existed.

The contentions of the petitioners with respect to the Act as applied to contracts of the nature of those represented by the debentures are:

(a) Subsection (b) of section 26 limits the operation of the Act, so far as antecedent contract rights are concerned, to contract rights of persons who, in violation of provisions of the Act, or of rules, regulations or orders thereunder, shall have made or engaged in the performance of contracts the performance of which involves violations of, or the continuance of relationships or practices in violation of, provisions of the Act or rules, regulations, or orders thereunder.

(b) Subsection (c) of section 26, pertaining to loans, extensions of credit, debts, obligations and liens, further limits the operation of the Act so that even in the case of a loan, extension of credit, debt, obligation or lien which violates the provisions of the Act or a rule or regulation thereunder, the Act protects from invasion by the Commission (1) the rights of lenders and lienors who have had no actual knowledge of facts

by reason of which the making of the loan or extension of credit or the acquisition of the lien is a violation of the provisions of the Act or any rule, or regulation thereunder, and (2) the rights of any person who shall have acquired his debt, obligation, or lien "in good faith for value and without actual knowledge of the violation of any provision of this title or any rule or regulation thereunder affecting the legality of such debt, obligation or lien".

(c) These provisions of section 26 manifest an intention on the part of Congress to exclude from the operation of the Act antecedent rights of the nature of those held by the debentureholders herein, that is, the rights of securityholders not found to have knowledge of violations due to the existence of their securities; and it is evident that under the limitations of section 26 the Commission was without power to treat the debentures as it has treated them in this instance, that is as if the "sacred right" of the debentureholders to retain their debentures until the stipulated maturity dates did not exist.

(d) Even if the intention to exclude such antecedent rights were in doubt, still it is true that there is no ground whatever for contending that interference with the rights of the debentureholders of Power was manifestly intended by Congress and is authorized by "the unequivocal and inflexible import of the terms" of the Act.

These provisions of Section 26, when read in connection with the provisions of Section 11(b) authorizing the Commission to take such action as it "shall find necessary" to fulfill its duties under the Act, mark out the limits of the Commission's power with respect to contract rights, loans, extensions of credit, debts, obligations, and liens, fixing the line of demarcation beyond which the Commission is not authorized to go in the impairment of contracts, debts, obligations, etc.

POINT V

It is important that the holding of the court below that the future interest payments on the debentures are excused because of the Commission's order for the dissolution of Power be now reviewed by this Court, both because of the far-reaching effect of the holding, if allowed to stand as a precedent, and because it evidently is erroneous.

This point relates to Question 6.

The court below held that the debenture contracts are "no longer binding" and the "future interest payments are excused" because the contracts "contemplated as indispensable the continued existence" of the obligor, Power, and it is to go out of existence by order of the Commission.

This holding is contrary to the general principle of law, first asserted in *Paradine v. Jane*, Aleyn 26 (1647), that when a party by his own contract creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. While this principle has been the subject of minor encroachments, it is still a principle of great vitality, and, as this Court very strongly indicated in *Columbus Ry. & Power Co. v. Columbus*, 249 U. S. 319 (1918), is to be given due recognition by our courts. In the *Columbus* case this Court said (p. 412) with respect to certain language used in the earlier case of *Chicago, Milwaukee & St. Paul Ry. Co. v. Hoyt*, 149 U. S. 1 (1892), and which if read without regard to the facts of that case might indicate a relaxation of the general principle:

"It certainly was not intended to question the principle, frequently declared in decisions of this court, that if a party charge himself with an obligation possible to be performed, he must abide by it unless performance is rendered impossible by the act

of God, the law, or the other party. Unforeseen difficulties will not excuse performance. Where the parties have made no provision for a dispensation, the terms of the contract must prevail. *United States v. Gleason*, 175 U. S. 588, 602, and authorities cited; *Carnegie Steel Co. v. United States*, 240 U. S. 156, 164, 165. The latest utterance of this court upon the subject is found in *Day v. United States*, 245 U. S. 159, in which it was said: 'One who makes a contract never can be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking. The modern cases may have abated somewhat the absoluteness of the older ones in determining the scope of the undertaking by the literal meaning of the words alone. *The Kronprinzessin Cecilie*, 244 U. S. 12, 22. But when the scope of the undertaking is fixed, that is merely another way of saying that the contractor takes the risk of the obstacles to that extent.' "

The general principle, as stated in the *Columbus* case, is that "if a party charge himself with an obligation possible to be performed, he must abide by it". In the debentures the obligor charged itself with an obligation possible to be performed and it must abide by it. The obligation is an absolute promise to pay money, in words such as have been used from time immemorial in promissory notes: "* * * promises to pay * * * dollars * * * on the first day of January, 1973 * * * and to pay interest thereon from the first day of January, 1923, at the rate of six per centum per annum * * * on the first day of January and the first day of July in each year until payment in full of said principal sum" (R. 220). Unquestionably that is an obligation which is "possible to be performed", and "the scope of the undertaking is fixed" absolutely by the promissory words themselves. An obligation merely to pay money is always possible to be performed; in law there is no impossibility in the payment of money. It may turn out that the obligor is unable to pay as and when promised,

but that is not impossibility. Obligations to pay money are not like the obligations in "contracts for conduct", as this Court, speaking through Mr. Justice HÖLMES, described them in the *Kronprinzessin Cecilie* case cited in the foregoing quotation from the *Columbus* case; and that is why this Court in its opinion in the *Cecilie* case deemed contracts like the debentures, that is, contracts for "the transfer of fungibles like money" to be within the principle of *Paradine v. Jane*, which is the general principle announced in the *Columbus* case, and not within the exception which mitigates the general principle. In the case of the debentures it has been found that the obligations are possible to be performed even in the event of the dissolution of the obligor, as we point out below.

The decision of the court below, if not reversed, would have the unprecedented result of depriving absolute promises to pay money of the protection of the principle of *Paradine v. Jane*, contrary to a long line of decisions.

For its holding that the future interest payments are excused—in other words, that the principle of *Paradine v. Jane* should be mitigated in this case because of a supervening event—the court gave as a reason that "the venture has been frustrated". Apparently it intended to apply the frustration rule or doctrine (although it did not specifically mention it) sometimes applied "where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated" (Sec. 288, *Restatement, Contracts*). But that rule is not applicable to contracts, such as the debenture contracts, which one party has wholly performed when the contract is formed (Sec. 289, comment *b*, *Restatement, Contracts*). The debentures were issued for money advanced by the purchasers of the debentures and were fully performed on the part of the purchasers at the time of issuance (R. 181).

In connection with its holding that the future interest payments were excused by reason of the frustration of the

venture, the court pointed out that impossibility was not the reason. It refused to sustain the argument of Power and the Commission that Power should be discharged of its obligation to pay interest because dissolution would make performance of that obligation impossible. The court properly said that in the present case substantial performance could be rendered by Power's paying the present equivalent of the future interest payments, which it is prepared to do, and that therefore it cannot be said that the future payments of interest are excused because of impossibility. The court might have added that if there were any impossibility of performance involved in the present case it would be due not to the nature of the performance but wholly to the inability of the obligor and that such impossibility (being subjective, as distinguished from objective) never affords an excuse from performance. *Restatement of Contracts*, Sec. 455; *Williston on Contracts*, 1938 Ed., Sec. 1932.

Then the court below, having said that impossibility was not the reason for its holding, sought to apply a principle announced and applied by this Court in cases of impossibility—citing *Texas Company v. Hogarth Shipping Company*, 256 U. S. 619 (1920) and *Chicago, Milwaukee & St. Paul Railway Co. v. Hoyt*, 149 U. S. 1 (1892). This is the principle as set forth by this Court in the *Texas Company* case (pp. 629, 630): “* * * where parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability, the contract must be regarded as subject to an implied condition that, if before the time for performance and without the default of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it.” As the Court said (p. 631), compliance with the contract involved in that case “was made impossible by an act of state”.

We now mention three reasons why this principle is not applicable here, these being in addition to the all-sufficient reasons referred to above, that there is no impossibility of performance in the present case, that if there were any impossibility here, it would not be objective, and that the application of the principle is limited to cases of objective impossibility.

1. According to leading cases in England—where the consequences of such supervening events have been rather fully worked out—the device of the implied condition is resorted to only in circumstances of impossibility (McElroy, *Impossibility of Performance*, p. 63, citing cases). Mr. McElroy points out that the reason for the limitation is that a wide use of the device would inevitably undermine the sanctity of contract and thereby create a greater mischief than the one it was designed to prevent.

2. One of the essential factors in the principle as stated in the *Texas Company* case does not exist in the present case, namely, the assumption by the parties that some particular thing essential to performance (in the present instance Power) would continue to exist; for (1) the parties did not assume that Power would continue to exist and (2) the continued existence of Power was not essential to performance of the contractual obligation. That the parties contemplated Power might cease to exist is evidenced by the provisions of the debenture agreements permitting Power to merge or consolidate with another corporation and then “be dissolved” provided the new corporation assume Power’s obligations with respect to the debentures (R. 239, 240; and note the reference to these provisions on page 23 of the petition). These provisions also show that the continued existence of Power is not essential to performance; its obligations might be carried out by a successor corporation. Even in a case of plain dissolution, not involving a consolidation or merger, the continued existence of Power is not essential to performance. In the proceeding for dissolution the directors as trustees in liquidation might properly set aside a sum of money as a trust fund

to pay the principal of the debentures when due and interest in the meanwhile.

3. Where a supervening event is deemed to be an excuse, the courts, as in the *Texas Company* case, justify the result by finding in the contract an implied condition that performance should be excused upon the occurrence of such event. In the present case, however, there is no reasonable basis for implying a condition that the dissolution of Power should excuse it from performing its contractual obligations. To imply such a condition would be tantamount to inserting in the contracts a provision which, in all probability, the parties themselves would not have inserted had they, at the time the contracts were made, anticipated the dissolution of Power under the Commission's order and specifically dealt with this event. The contracts evidence a strong intent of the parties to protect the debentureholders in their investment. Power was authorized to merge or consolidate with another corporation only on condition that the new corporation agree to assume payment of the principal of and interest on the debentures, and to observe all Power's covenants in the debenture agreements (R. 239, 240). While Power might redeem the debentures prior to their maturity it could do so only on payment of a redemption premium estimated by the parties as adequate to compensate the debentureholders for a premature termination of their investments (R. 301, 302). It could hardly have made any difference to the debentureholders whether their investments were prematurely terminated by the Company's exercising its option of redemption or by the dissolution of the Company under orders of the Securities and Exchange Commission. Had they specifically dealt with the latter eventuality, is it not reasonable to suppose that the debentureholders would have insisted upon the same adjustment in the event of dissolution as they did with respect to redemption prior to maturity? Under the circumstances, there is no sound reason for implying in this case a condition that Power's

dissolution should absolve it from its obligation to pay interest on the debentures.

We note that this Court, as we understand its opinion, has indicated that the device of finding an implied condition that performance would be excused upon the happening of a certain event may be resorted to only where it cannot be believed that the parties, had they dealt with the event, would have failed to make such condition so as to exclude the risk of such event from the risks of the contract. We have in mind the following from the opinion of this Court, written by Justice HOLMES, in *The Kronprinzessin Cecilie* case, at page 22:

“The seeming absolute confinement to the words of an express contract indicated by the older cases like *Paradine v. Jane*, Aleyn, 26, has been mitigated so far as to exclude from the risks of contracts for conduct (other than the transfer of fungibles like money,) some, at least which, *if they had been dealt with, it cannot be believed that the contractee would have demanded or the contractor would have assumed.*” (Italics ours.)

Substantially the same thought is to be found in *Chicago, Milwaukee & St. Paul Ry. Co. v. Hoyt*, 149 U. S. 1 (1892), cited in the opinion of the court below. In this case, this Court said (pp. 14 and 15):

“There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the non-performance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possi-

bility of the particular contingency which afterwards happens.”

The inference is to be drawn from the last sentence of the quoted language that a supervening event will not afford an excuse from performance if, at the time of making the contract, the parties had in contemplation an event of the same general character and did not provide that its occurrence would afford an excuse. Where the parties have anticipated an event of a certain general character, it is reasonable to suppose that had they intended an event of that character should afford an excuse from performance, they would have so provided.

In the present case the parties anticipated an event of the general character of the supervening event (the dissolution) when they specifically provided for the merger or consolidation of Power and provided that upon the assumption of the debentures by a successor corporation Power “may be dissolved” (R. 240). And even if the character of the supervening event is narrowed to the particular type of dissolution now under consideration, namely, dissolution “by governmental power”, the parties must be deemed to have anticipated dissolution by action of the State of Maryland, which certainly would be dissolution by governmental power. Such action under various circumstances was provided for by statutes of Maryland which were in existence at the time the debenture agreements were made and which had been in existence for many years (Md. Ann. Code of 1924, art. 23, sec. 98; art. 81, secs. 103, 107), and in the Maryland law reports there were cases in which corporations had been dissolved pursuant to such statutes (*State v. Easton Social Club*, 73 Md. 97; 20 Atl. 783 (1890) and other cases cited in the annotations). Under the language of *Chicago, Milwaukee & St. Paul Ry. Co. v. Hoyt*, such anticipation of dissolution would be an additional reason for *not* treating the supervening event as an excuse, and therefore that case, instead of being authority for the holding of the court below, is diametrically opposed to the result reached by it.

From the foregoing it appears that neither the *Texas Company* case nor the *Hoyt* case, cited by the court below, is authority for the position taken by it and that the instant case does not involve impossibility or frustration of any kind which has previously been regarded by courts as affording an excuse from performance.

These additional considerations must be mentioned:

A. No attempt has heretofore been made to apply to a negotiable instrument the principle which the court below seeks to apply here—so far as we have found.

B. The subject of negotiable instruments is not included in the *Restatement of Contracts*, Secs. 460 and 461 of which are cited by the court below. It is so stated in Sec. 10, comment a, of the *Restatement*. For that reason those sections do not apply here.

C. An additional reason why Secs. 460 and 461, *Restatement, Contracts*, do not apply here is that they are expressly limited to cases of impossibility. They are contained in Chapter 14, which is headed "Impossibility", and at the beginning of the Chapter (Sec. 454, Comment b) is this statement: "This Chapter relates to the legal operation of impossibility, as preventing a duty to perform a promise from arising, or as discharging such a duty after it has arisen, because the promise either is impossible of performance when made or subsequently becomes so." As stated in Section 454, "Impossibility" as used in the *Restatement* means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved. In the present case, there is no impossibility of performance and no impracticability of the nature specified in Section 454, since substantial performance is possible by the mere payment of money held in escrow for the purpose.

D. When Power received the money from debentureholders, it got all it bargained for and there was no further obligation which the debentureholders were obligated

to fulfill. The only conceivable frustration involved is that Power may not be able to use the money for the period of time it expected to be able to do. That kind of disappointment is not sufficient to excuse performance. *Moreland v. Credit Guide Pub. Co., Inc.*, 255 Mass. 469, 152 N. E. 62 (1926); *Cooper v. Mundial Trading Co.*, 105 Misc. 58, 172 N. Y. S. 378, affd. 188 App. Div. 919 (1918). But it is questionable whether even such disappointment exists when we consider that the debentureholders' money was obtained for use of the Power system and not Power alone and there is nothing in the record to show that the system could not make use of the money until the maturity of the debentures.

E. While the court below recognized and stated that the instant case is not one of impossibility of performance, it seems to have had a feeling that there is an element of illegality involved, for it cites two cases: *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U. S. 324, and *Louisville & Nashville R. R. v. Motley*, 218 U. S. 467, where performance was excused because it would have been illegal to perform. But there is nothing illegal in paying interest on debentures, and all the debentureholders seek is the enforcement of that obligation or payment of the equivalent of its fulfillment.

The decision of the court below on the effect of the dissolution by governmental order, it is respectfully submitted, lacks authority and sound reasoning. It constitutes an unprecedented and dangerous encroachment on the cardinal principle first asserted in *Paradine v. Jane* in 1647 and restated by this Court in the *Columbus* case, as set forth above. It is particularly important that the integrity of this principle be maintained, where, as in the present case, the contract is one for the payment of money only and is embodied in a negotiable instrument. In the *Kronprinzessin Cecilie* case, *supra*, this Court, speaking through Justice HOLMES, indicated that the rule had never

been relaxed with respect to contracts for "the transfer of fungibles like money", and it is highly important that with respect to such contracts it should not be relaxed.

POINT VI

The debentureholders are entitled to receive payments in the amount of the redemption premiums in lieu of future interest payments and as compensation for the premature termination of their investments.

In the light of the discussion in the petition and in this brief concerning the holding of the court below that the future interest payments have been excused because of the Commission's dissolution order, it appears that the court below is in error and that neither such interest payments nor any other obligations of Power under the debentures have been discharged by that order. It is clear, therefore, that the right of the debentureholders to receive the principal at the specified maturity, not before, and to receive the promised semi-annual installments of interest until then was not taken away by the dissolution order. Now what is the situation of the debentureholders? Under the Order for the retirement of the debentures they receive the principal now, thirty years before maturity, and the future interest payments are cut off without any compensatory payment to the debentureholders. It is plain that this result is contrary to the intention of the debenture contracts.

The provision of the debenture contracts regarding payment of the debentures was summarized in the Commission's findings and opinion (R. 301, 302). It shows clearly the intention of the parties.

The provision here referred to was to the effect that the debentures would remain outstanding until their stipulated maturity "as the valid obligations of the issuing company" and interest thereon would be paid in the meantime, except that the obligor had "the right * * * to

redeem and pay off" the debentures before their stipulated maturity (but not without paying a premium in addition to the principal amount) and except that in the event of a default by the obligor the Trustee on behalf of the debentureholders might accelerate the maturity of the debentures, in which event no premium would be payable. That is substantially what is said in the findings and opinion (R. 301 and 302).

As the court below said: "* * * the debenture agreements, in so far as they provide for the payment of principal on dates certain and the payment of interest at a specified rate to the maturity dates, gave the bondholders the right to insist that the payment of principal should be made only at maturity and interest should be paid until then. *Missouri K. & T. Railway Co. v. Union Trust Co.*, 156 N. Y. 592."

Also, in footnote 11 of the findings and opinion (R. 306) the Commission mentions the fact that "the debentures and agreements are barren of any provision that would give the company a right to liquidate the debt prior to maturity without payment of a premium".

Thus the debenture contracts clearly show an intention to protect the debentureholders from being deprived of their debentures before the stipulated maturity without being given compensation for such deprivation—save only in the event of default; there is no intimation in the contracts that under some circumstances other than default the debentureholders would not have such protection. Thus it appears that the debenture contracts contemplated that the future interest payments would not be cut off by retirement of the debentures without a compensatory payment to each debentureholder.

The contention of the petitioners is that, as the debenture contracts contemplated that the future interest payments would not be cut off by retirement of the debentures without a compensatory payment to each debentureholder, each holder is entitled to a payment in lieu of future interest payments and as compensation for the premature termination of his investment,—even though it be assumed

(as argued by Power and the Commission) that the redemption provisions specifically requiring payment of premiums by the obligor are not applicable in the present situation, where the retirement of the debentures is forced by governmental order. As to the amount of the compensation for the premature termination of the investments: It naturally will be the amount agreed upon in the debenture contracts as the premium payable upon premature retirement, that is to say, nine per cent of the principal amount. There could not be a more appropriate standard.

The provisions of the article of the debenture agreements on "successor corporations"—summarized in the Commission's findings and opinion (R. 302) and printed at pages 239, 240 of the Record—support this contention and, more than that, they even show that the parties had in mind the possibility that the issuing company might sell its properties (just as Power has sold its mortgaged properties and thereby obtained cash used in the retirement of the debentures and in providing the escrow fund) and that the issuing company might apply the proceeds of the sale to the payment of its debentures and go out of business and be dissolved; and we conclude from the consideration of those provisions in connection with the redemption provisions that the parties evidently intended that in such a case the payment of the debentures would be carried out in accordance with the general redemption provisions.

In the article on successor corporations the parties provided, among other things, for a case where all of the property of the issuing company would be purchased by a successor corporation which would assume the obligations of the issuing company under the debenture contracts, and the issuing company would then be dissolved. In working out that provision, the parties naturally would think of the possibility that the purchasing corporation might not assume the debenture obligations but might pay the issuing company, in consideration of the transfer of its property, cash sufficient to enable it to retire the debentures. Indeed, it seems inconceivable that the parties did not have that

possibility in mind. And yet they made no special provision for such a case, but left it to be taken care of under the general redemption provisions. The only reasonable inference is that the parties intended that in such a case the payment of the debentures would be carried out in accordance with the redemption provisions.

POINT VII

The plan approved by the Order for the retirement of the debentures is unfair and inequitable with respect to the debentureholders.

The dissolution order provided, in substance, that any plan submitted pursuant thereto should be fair and equitable (R. 116). In approving the Plan, the Commission referred to it as "being fair and equitable to the persons affected thereby" (R. 315).

In the petition we mention as one of the unfair and inequitable features of the Plan the failure to give the debentureholders treatment similar to that which was given to the holders of Power's First Lien and Consolidated Mortgage Bonds. Those bondholders were well provided for under an earlier plan submitted under the dissolution order. They were not deprived of their bonds without the payment of redemption premiums (R. 138; the first paragraph of Division VII, p. 9, and the third paragraph of Division I, p. 5, of Application No. 5, Document 34, unprinted). The unfairness of such discrimination against the debentureholders has been somewhat obscured by the submission of the Plan concerning the bonds a considerable time in advance of the submission of the Plan concerning the debentures, instead of combining them in a single comprehensive plan. The turn of the debentureholders to be disposed of and to present their objections did not come (under the program which was followed) until after the bondholders had been provided for without loss; and that in itself was

unfair to the debentureholders, because it kept the two proposals from being lined up side by side for comparison.

The Plan is unfair and inequitable with respect to the debentureholders in that the company next below Power in the system, the top subsidiary (which is a person "affected thereby", since it is to receive the escrow fund if not distributed among the debentureholders) is to get the fund as "a contribution" to its paid-in surplus and the fund is to "remain in the business, available for the future needs" of the top subsidiary (the second paragraph of Division XI, p. 13, Application No. 5, Document 34, unprinted). No indication has ever been given as to why that result is deemed to be fair and equitable with respect to the debentureholders, unless it is to be found in the untenable contention that the obligations of Power under the debenture contracts have been discharged by the dissolution order and all contract rights of the debentureholders terminated.

The Plan is unfair and inequitable with respect to the debentureholders in comparison with the stockholders. It is not clear how much benefit the stockholders of Power would receive from the cash which it would save if the escrow fund were not distributed among the debentureholders. In that event, the fund would go to the top subsidiary, the common stock of which would be distributed among Power's preferred stockholders, and possibly its common stockholders also. In any event, whatever benefit Power's stockholders, or some of them, might receive in that way would be in addition to the benefits mentioned on page 105 of the Record, where the Commission said that "the evidence indicates that the present stockholders of" Power "should be benefited by the receipt of the common stock of an underlying holding company, since they will be that much nearer to the assets and income of the operating companies". Surely the possibility that such added benefit might accrue to the stockholders does not justify the contribution of the escrow fund to the top subsidiary.

Moreover, the giving of such additional benefit to the stockholders would violate the rule that the interests of

stockholders are not to be advanced at the expense of prior rights of creditors. *Case v. Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106; *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482; *Louisville Trust Co. v. Louisville N. A. & C. Ry. Co.*, 174 U. S. 674; *Kansas City Terminal Ry. Co. v. Central Union Trust Co.*, 271 U. S. 445; *Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510, 527, 528.

Certainly it is true, at the least, that if the petitioners are right in their contention that Power's obligations under the debenture contracts have not been discharged by the dissolution order, there would be no fairness or equity in depriving the debentureholders of the escrow fund and turning it over to the top subsidiary as a contribution to it, with the possibility that Power's stockholders might receive in that way a benefit which they otherwise would not receive.

In the Commission's findings and opinion nothing is said concerning the considerations presented above under this Point VII; there is nothing on the point of fairness and equitableness beyond the conclusion that the Plan is fair and equitable to the persons affected thereby and the holding that the terms of the debenture contracts create no contractual obligation on the part of Power to pay a redemption premium and no right on behalf of the debentureholders to receive such premium and that no such obligation or right exists by virtue of any other recognized legal or equitable principle, and further that the contention of the debentureholders that, even if the redemption provisions are held inapplicable, still some compensation must be given to the debentureholders for the premature termination of their investments, is disposed of by the consideration that the termination of the investments of debentureholders and stockholders alike has been brought about by Congressional mandate. The Commission's conclusion that the Plan is fair and equitable seems to depend entirely upon the correctness of such holding, so that, should this Court determine that the holding was erroneous, there would be nothing in the Commission's find-

ings to support its conclusion that the Plan was fair and equitable.

More might be said regarding the errors of the court below, but we believe the foregoing is sufficient for our immediate purpose, which is merely to present principal points and authorities which may be helpful to this Court in its consideration of the petition, without attempting to present a complete argument on the issues.

Respectfully submitted,

BEN LEROY STOWELL,

IRWIN L. TAPPEN,

HOWARD A. MARX,

For Petitioners.

February 26 , 1943.



**Excerpts from the Public Utility Holding Company
Act of 1935**

(Being Title I of the Public Utility Act of 1935,
approved August 26, 1935)

**TITLE I—CONTROL OF PUBLIC-UTILITY
HOLDING COMPANIES**

NECESSITY FOR CONTROL OF HOLDING COMPANIES

SECTION 1. (a) Public-utility holding companies and their subsidiary companies are affected with a national public interest in that, among other things, (1) their securities are widely marketed and distributed by means of the mails and instrumentalities of interstate commerce and are sold to a large number of investors in different States; (2) their service, sales, construction, and other contracts and arrangements are often made and performed by means of the mails and instrumentalities of interstate commerce; (3) their subsidiary public-utility companies often sell and transport gas and electric energy by the use of means and instrumentalities of interstate commerce; (4) their practices in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage; (5) their activities extending over many States are not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies.

(b) Upon the basis of facts disclosed by the reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session), the reports of the Committee on Interstate and Foreign Commerce, House of Representatives, made pursuant to H. Res. 59 (Seventy-second Congress, first session) and H. J. Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is hereby declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy

and natural and manufactured gas, are or may be adversely affected—

(1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issuers, because of the absence of uniform standard accounts; when such securities are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies; when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary public-utility companies; when such securities are issued by a subsidiary public-utility company under circumstances which subject such company to the burden of supporting an overcapitalized structure and tend to prevent voluntary rate reductions;

(2) when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; when service, management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States;

(3) when control of subsidiary public-utility companies affects the accounting practices and rate, dividend, and other policies of such companies so as to complicate and obstruct State regulation of such companies, or when control of such companies is exerted through disproportionately small investment;

(4) when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties; or

(5) when in any other respect there is lack of economy of management and operation of public-utility companies or lack of efficiency and adequacy of service rendered by such companies, or lack of effective public regulation, or lack of economies in the raising of capital.

(c) When abuses of the character above enumerated become persistent and wide-spread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title.

DEFINITIONS

SEC. 2. (a) When used in this title, unless the context otherwise requires—

* * * * *

(28) "Interstate commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

* * * * *

SIMPLIFICATION OF HOLDING-COMPANY SYSTEMS

SEC. 11. (a) It shall be the duty of the Commission to examine the corporate structure of every registered holding company and subsidiary company thereof, the relationships among the companies in the holding-company system of every such company and the character of the interests thereof and the properties owned or controlled thereby to determine the extent to which the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system.

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing

in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

(c) Any order under subsection (b) shall be complied with within one year from the date of such order; but the Commission shall, upon a showing (made before or after the entry of such order) that the applicant has been or will be unable in the exercise of due diligence to comply with such order within such time, extend such time for an additional period not exceeding one year if it finds such extension necessary or appropriate in the public interest or for the protection of investors or consumers.

(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such dis-

position in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any persons having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as

sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

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COURT REVIEW OF ORDERS

SEC. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by

reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

* * * * *

VALIDITY OF CONTRACTS

SEC. 26. (a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or with any rule, regulation, or order thereunder shall be void.

(b) Every contract made in violation of any provision of this title or of any rule, regulation, or order thereunder, and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title, or any rule, regulation, or order thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, regulation, or order.

(c) Nothing in this title shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this title, unless at the time of the making of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of which the making of such loan or extension of credit (or extension or renewal thereof) or the acquisition of such lien is a violation of the provisions of this title or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this title or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien.



No. 772

(14)

MAR 20 1943

CHARLES HENRY CHAPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

THE NEW YORK TRUST COMPANY, as the Trustee under
the Debenture Agreements between it and THE
UNITED LIGHT AND POWER COMPANY; MARY A.
WALDRON, FREDERICK H. BRUNNER, AMERICAN
EQUITABLE ASSURANCE COMPANY OF NEW YORK,
KNICKERBOCKER INSURANCE COMPANY OF NEW
YORK, NEW YORK FIRE INSURANCE COMPANY,
MERCHANTS AND MANUFACTURERS INSURANCE
COMPANY OF NEW YORK, and AMERICAN RESERVE
INSURANCE COMPANY,

Petitioners,

—against—

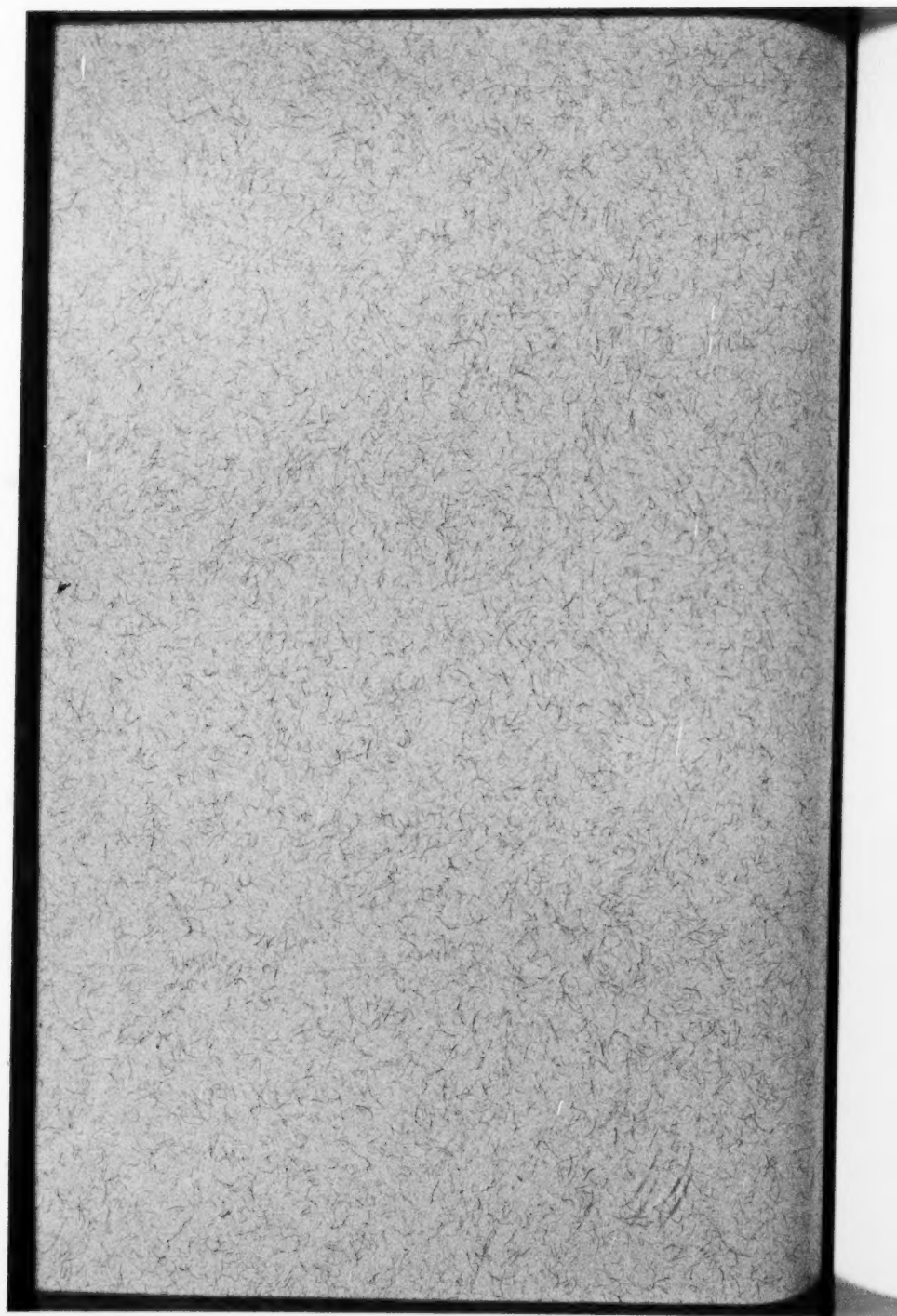
SECURITIES AND EXCHANGE COMMISSION and THE
UNITED LIGHT AND POWER COMPANY,

Respondents.

**BRIEF FOR RESPONDENT, THE UNITED LIGHT
AND POWER COMPANY, IN OPPOSITION TO
THE PETITION FOR WRIT OF CERTIORARI**

DONALD R. RICHBERG,
PARK CHAMBERLAIN,
JOHN DERN,

*Attorneys for Respondent,
The United Light and Power Company.*



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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

THE NEW YORK TRUST COMPANY, as the Trustee under the Debenture Agreements between it and THE UNITED LIGHT AND POWER COMPANY; MARY A. WALDRON, FREDERICK H. BRUNNER, AMERICAN EQUITABLE ASSURANCE COMPANY OF NEW YORK, KNICKERBOCKER INSURANCE COMPANY OF NEW YORK, NEW YORK FIRE INSURANCE COMPANY, MERCHANTS AND MANUFACTURERS INSURANCE COMPANY OF NEW YORK, and AMERICAN RESERVE INSURANCE COMPANY,

Petitioners,

—against—

SECURITIES AND EXCHANGE COMMISSION and THE UNITED LIGHT AND POWER COMPANY,

Respondents.

BRIEF FOR RESPONDENT, THE UNITED LIGHT AND POWER COMPANY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

Opinions Below

The Findings, Opinion and Order of the Securities and Exchange Commission appear at pages 294-318 of the Record.

The opinion of the United States Circuit Court of Appeals for the Second Circuit affirming the order of the Commission appears at pages 320-325 of the

Record. It is reported in 131 F. (2d) 274 (Adv. Op.); and, being short, is reprinted as Appendix A to this brief.

Summary Statement of the Matter Involved

The petitioners' statement and exposition of the questions presented are so lengthy and confused that we think a summary presentation would be useful to the Court.

On March 20, 1941, the Securities and Exchange Commission, in a proceeding which had been instituted by it, found that the liquidation and dissolution of The United Light and Power Company were necessary to comply with Section 11(b) (2) of the Public Utility Holding Company Act of 1935. (R. 109) The Commission so ordered; and by its order also required the Company to make application to the Commission for the entry of any further orders necessary or appropriate to effect such liquidation and dissolution. (R. 116) *No appeal was taken from that order.*

The Company proceeded to comply with the order and, with the approval of the Commission in each instance, completed a series of transactions which were necessary to enable it to carry out its liquidation. As a result, the Company was able to obtain sufficient funds to pay off its debentures in cash. The Company then filed Application Number 8 in which it proposed a plan for the payment of its debentures in cash at their principal amount, plus accrued interest to May 1, 1942. (R. 177-242) These debentures were subject to redemption *at the election* of the company at any time prior to maturity by payment of principal and accrued interest, plus a diminishing premium, which would have been 9% of principal at the time of proposed payment. (R. 226) The company took the position in its application that, since payment of the deben-

tures was compulsory and not "at the election of the company", no premium should be paid.

On February 25, 1942, the Commission, by unanimous opinion, approved the Application, finding (a) that payment of the debentures was necessary to effectuate the provisions of Section 11(b) (2) of the Act and to enable the Company to liquidate and dissolve in compliance with the order of March 20, 1941, and (b) that payment in the manner proposed was fair and equitable to all persons affected. (R. 294-315)

Petitioners obtained a review of the order in the Circuit Court of Appeals for the Second Circuit and contended that the premium payable on voluntary redemption (or an amount equivalent thereto) should be paid in addition to the principal and accrued interest. That court, by unanimous opinion, affirmed the order of the Commission. (Opinion copied in Appendix A)

Controlling Facts

1. The order of March 20, 1941, was not appealed and is not now subject to review.¹ Therefore, the *necessity* of taking appropriate steps to liquidate and dissolve the Company; and the power of the Commission to enter the order of March 20th, cannot now be questioned.

2. Neither the debentures nor the debenture agreements contained any provision requiring any

¹ "Any person or party aggrieved by an order issued by the Commission under this chapter may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part." (Public Utility Holding Company Act of 1935, Section 24)

payment in excess of principal and accrued interest in the event of involuntary dissolution. (R. 220-242) The Company had the "right" or "option" to pay the debentures prior to maturity if it voluntarily "elected to redeem" them; and in that event a correlative right arose in the debenture holders to be paid a premium. (R. 228, 231) The liquidation and dissolution is clearly involuntary, being under compulsion of the Act and the order of March 20, 1941. The Company has not elected to redeem and therefore no contractual right of the debenture holders to a premium has arisen. (See Findings and Opinion of Commission, R. 304-306)

3. The right of the debenture holders to retain their debentures until maturity, like the right of the Company to retain and use the creditors' money until maturity, depended on the right of the Company to exist. When the sovereign power of the State ended the Company's right to exist, these dependent rights necessarily ceased to exist.

Questions Involved

The only questions involved are, *first*, whether payment of the debentures was "necessary" to enable the Company to liquidate and dissolve in compliance with the Commission's order of March 20, 1941; and, *second*, whether payment of the debentures at their principal amount, plus accrued interest, was fair and equitable to the debenture holders and the stockholders of the Company.

Both of these questions were properly decided in the affirmative by the Commission and the Court below. These questions involve merely the application of well-recognized legal principles which have been clearly established by this Court. The court below correctly applied these principles and its decision is not in con-

flict with the decisions of this Court or with those of other courts.

Petitioners imply that there *might* be a conflict with the decision of a case pending in the Seventh Circuit (Petition, p. 10); but the United States Circuit Court of Appeals for the Seventh Circuit handed down its decision of that case on March 5, 1943, and expressly agrees with the decision of the Second Circuit in the present case. We quote a part of that opinion hereafter (p. 12).

The other questions presented by the petitioners and their arguments with respect thereto are irrelevant. In substance, they relate to and constitute an attack upon the validity of the order of March 20, 1941, which is not now subject to review.

ARGUMENT

I

A Review of the Decision Below Is Not Warranted on the Ground That It Involves Important Questions of Federal Law Which Have Not Yet Been Settled by This Court

Was Payment of Debentures "Necessary"?

The argument that payment of the debentures was not "necessary" is without substance. The company had been ordered to liquidate and dissolve. To do so it must either pay its debts or provide for their assumption by some other party. The Commission specifically found that payment was necessary and that an assumption by any other party was not feasible and would not be permissible under the provisions of the Act. (R. 299-301) This finding was based upon competent and substantial evidence and no evidence justifying a contrary conclusion was presented by pe-

tioners or any other party. Furthermore, Section 24(a) of the Act provides that "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." A determination that it is necessary for a company to pay its debts in order to liquidate and dissolve does not present any doubtful or important question of federal law which requires a decision of this Court.

Was Payment Without Premium "Fair and Equitable"?

This question involves a determination of what is fair and equitable treatment of creditors when, by governmental action, a debtor is required by law to pay, and creditors are required by law to accept payment of, an indebtedness prior to the stipulated maturity date. This calls for an analysis of the contract between the parties to determine their contractual or legal rights and a study of all other facts and circumstances to determine whether there are any equitable factors which require a departure from the contractual or legal rights. This question does not involve novel principles or doubtful issues of public importance.

Neither the debentures nor the debenture agreements provided for the payment of any premium upon a dissolution of the Company. (R. 220-242) They provided for the payment of a premium only in case the Company should voluntarily *elect to redeem* the debentures. (R. 228, 231) The Company has been compelled to dissolve by the passage and enforcement of a law which has made its continued existence unlawful. It did not promise to redeem its debentures, nor did it promise to pay a redemption premium, in case the maturity of the debentures should be accelerated by reasons beyond the control of the Company.

The debenture agreements contemplated two pos-

sibilities: First, that the Company, for its own benefit and for the benefit of its stockholders, might voluntarily desire to pay the debentures prior to their stipulated maturity date, in which event the payment of a premium would be required. The second possibility was that the debenture holders (through their trustee) might desire to enforce payment of the debentures prior to their maturity because of a default by the Company, in which event no premium would be payable. (R. 233-237)

The contract is silent as to the rights of the parties in the event maturity should be accelerated by conditions beyond the control of either party. Moreover, the fact that a premium was not intended to be paid on involuntary liquidation is emphasized by the provisions contained in the debenture agreements governing the rights and remedies of the bondholders in the event of default. Under these provisions, when maturity is accelerated because of specified contingencies, whether within or beyond the control of the Company, the Company is not required to pay a premium even though it may have sufficient funds to do so. (R. 237)

These provisions are significant because if the Company had not complied with the order of March 20, 1941, the Commission, under Section 11(d) of the Act, could apply to a court for the appointment of a trustee and the appointment of a trustee would constitute one of the events of default specified in the debenture agreements. (R. 234)

Thus, if we seek by analogy to find whether there is any legal right to a premium to be *implied* from the contract, we find that any such right is denied in all cases of forced payment prior to maturity which are covered in the debenture agreements.

From an analysis of the contract, the conclusion that there is no contract right to a premium is incapable. The Commission and the Court below so held; and the points involved in construing the contract are not of sufficient importance to require a review by this Court.

There being no contract right to a premium, the question arises whether the debenture holders are entitled to a premium, or other additional compensation, by virtue of some other legal principle. The law on this point has been well established by this Court and was properly applied by the Court below.

The decisions of this Court referred to in the opinion of the Court below clearly establish the legal rights and obligations of contracting parties whenever the performance of contracts is rendered impossible, or unlawful, or when the purpose of the contract has been frustrated by virtue of governmental action.

Under the contract between the parties here involved, the Company acquired the right to retain and use the money borrowed until the stipulated maturity date. As consideration for this right, the Company agreed to pay interest on the funds so used. By virtue of an Act of Congress the performance of this contract in the manner originally contemplated has become impossible (in fact unlawful) and the Company has been deprived of the benefits of its contract. Under these circumstances, the debenture holders, whose period of investment has been terminated by Congressional action, are not entitled to receive interest (or compensation for the loss thereof) after their principal has been repaid to them. This is clearly established by the decisions of this Court referred to in the opinion of the Court below.

If we regard the requirement of the Act that a plan must be "fair and equitable" as stating merely a rule of absolute priority, it follows that the manner in which the debentures were paid was fair and equitable to the debenture holders because they have received full payment in cash of their contract or legal rights.

If we regard the statutory test as one which encompasses equitable as well as legal factors, the Commission also acted properly in finding that there were no equitable factors which justify the payment of a premium. This is clearly demonstrated by the facts in the record.

The debentures were sold to the public below par. (R. 181) Interest at 6% and 6½% per annum was received by the debenture holders without interruption during a period when interest rates generally have steadily fallen. For a period of ten years prior to 1941, the market prices of the debentures were consistently below par and substantially below that figure during a large part of the period. (R. 206-210) It was not until after the Commission's order of March 20, 1941, was entered that the market prices reached par. At that time, it became common knowledge that the Company would be required to pay off its debentures in order to liquidate and dissolve. (R. 103) It was also common knowledge that the Company proposed to pay its debentures in cash at their principal amount, plus accrued interest, as soon as practicable. (R. 103)

The stockholders of the Company have suffered heavy financial losses because of their investment in the Company, while the debenture holders have not suffered any financial loss. Under these circumstances there can be nothing unfair or inequitable in permitting the owners to retain all the assets remaining

after all contractual and legal rights of the debenture holders have been satisfied in full.

Both the stockholders and the debenture holders invested their funds in a company which the Congress subsequently determined must be liquidated and dissolved. In so far as is consistent with proper recognition of contract rights, this burden of Congressional condemnation should be borne equitably by the parties; and the Congress so provided. Up to date, all of the burden has been borne solely by the stockholders. The only "detriment" which has been suffered by the debenture holders is full payment of their investment *in cash* prior to the stipulated maturity date—which may be highly beneficial to most of them.

Under these circumstances, and in the absence of a contractual provision requiring payment of the redemption premium, the Commission and the Court below clearly acted properly in finding that there was no justification for requiring the Company to pay \$1,358,000 more to the debenture holders, and thus to further reduce the stockholders' equity.

Findings and conclusions of the Commission as to the existence or non-existence of equitable factors of this type do not involve important questions of Federal law.

The conclusion of the Commission and the Court below that the plan of payment was fair and equitable was supported by substantial evidence and was arrived at by the proper application of well established legal and equitable principles. Accordingly, we do not believe that this Court should grant the petition on the ground that important and undecided questions of Federal law are involved.

In the absence of any doubtful issue of public importance warranting a review by the Supreme Court, we are justified in pointing out that the respondent

has been deprived for a year of the use of \$1,358,000, now on deposit in escrow; and that a further deprivation in order to allow an unnecessary review by this Court would add substantially to the loss already caused by petitioners' appeal.

II

A Review of the Decision Below Is Not Warranted on the Grounds That It is in Conflict with the Decisions of This Court or Those of Other Courts.

Petitioners allege that in so far as there are decisions of this Court applicable to the questions involved the decision of the Court below "probably—to say the least—was in conflict with applicable decisions of this Court." (Pet. p. 11)

We believe the reasons already stated clearly demonstrate that there is no such conflict. Petitioners seek to assert a conflict in decisions by ignoring the well recognized distinctions drawn by this Court between cases involving a "bad bargain" and those involving impossibility of performance or frustration due to Governmental action. It is immaterial whether the cases in the latter class be termed an exception to a general rule or whether they themselves announce a general rule. The important point is that they establish a well defined and recognized legal doctrine which is squarely applicable here, whereas the "hard bargain" cases have no relevancy.

Petitioners also assert as a reason for granting the petition the fact that a similar question was pending before the United States Circuit Court of Appeals for the Seventh Circuit. This was true at the time the petition was filed; but since then the case has been decided. That Court, likewise by unanimous opinion,

affirmed a similar order of the Commission in another proceeding, and adopted the reasoning of the Circuit Court of Appeals for the Second Circuit. *City National Bank and Trust Company of Chicago, as successor trustee, etc. v. Securities and Exchange Commission and North American Light & Power Company*, C. C. A. 7th, decided March 5, 1943. An extract from that opinion follows:

"There can be little, if any, doubt, so we think, but that the provisions concerning redemption had to do solely with voluntary action on the part of the corporation. The debentureholder was without right to require redemption. That was a right accorded to the corporation, to be exercised solely "at the option of the company." It is only upon the exercise of such option that the agreement requires the payment of a premium. Such option lodges in the corporation the discretion to mature the debentures at a date earlier than that otherwise provided. While it is true that the payment of premium was a form of compensation to the debentureholders, nevertheless the redemption provision was for the benefit of the corporation, which could be utilized only at its election. The language plainly indicates that the parties did not contemplate that the redemption provision should be effective upon action by the corporation as a result of the Commission's order. Action under legal compulsion is the antithesis of action by election or "at the option" of the moving party.

"Numerous authorities are cited and discussed relating to the doctrine of impossibility of contract performance and the closely allied doctrine of frustration of purpose. In the recent case of *New York Trust Co., et al v. Securities and Exchange Commission*, 131 Fed. (2d) 274, the court rejected the contention that the contractual provisions for redemption premium were applicable. The questions presented and decided in that case are almost identical with those of the instant case,

and the cases relied upon here were in the main considered. Inasmuch as we agree with both the reasoning and the result in that case, we think no good purpose could be served by a discussion of such cases."

It is clear that there is no conflict between the decisions and that no ground exists for reviewing the decision of the court below on that basis.

III

A Review of the Decision Below Is Not Warranted for Any of the Other Reasons Assigned by the Petitioners.

As already pointed out, the arguments of the petitioners are in large part an attack on the validity of the order of March 20, 1941, which is not now subject to review. The petitioners state that they were not parties to the proceeding at the time the earlier order was entered, and therefore had no opportunity to review it. But they do not deny that they had notice or knowledge of the order. The petitioners, even though they were not parties, had the right to seek a review of the order if they were aggrieved thereby. Section 24 of the Act provides that

*"Any person or party aggrieved by an order issued by the Commission under this chapter may obtain a review of such order in the Circuit Court of Appeals * * * ."*

The petitioners' argument, that compliance with a Commission order can only be effected by one over-all plan and not by a series of steps taken in logical sequence, is neither timely nor realistic. Compliance with the Act is a complex matter and must be effected in a scientific and orderly manner. Any other procedure would result in utter confusion. Those who

feel aggrieved by individual transactions have the right to seek review of Commission orders with respect thereto; but they cannot delay consummation of such transactions merely because others are to follow.

The collateral argument of the petitioners that the debenture holders were discriminated against because the Commission approved the assumption of an issue of the Company's Mortgage Bonds by another system company is equally without merit. The record clearly discloses why it was not necessary to pay the Mortgage Bonds and why payment of the debentures was necessary. (R. 143-174; 294-315) In fact, from the record it is quite apparent that the debenture holders themselves would have been the first parties to object if the Company, having been able to raise sufficient cash to pay off the debentures in full, had proposed to use the cash for any other purpose.

CONCLUSION

The decision below does not involve the construction of any provision of the Act which needs clarification as applied to the facts involved; nor does it involve any important questions of Federal law which have not been decided by this Court. Furthermore, it is not in conflict with any decisions of this Court or with those of other courts.

Therefore, we submit that the petition for writ of certiorari should be denied.

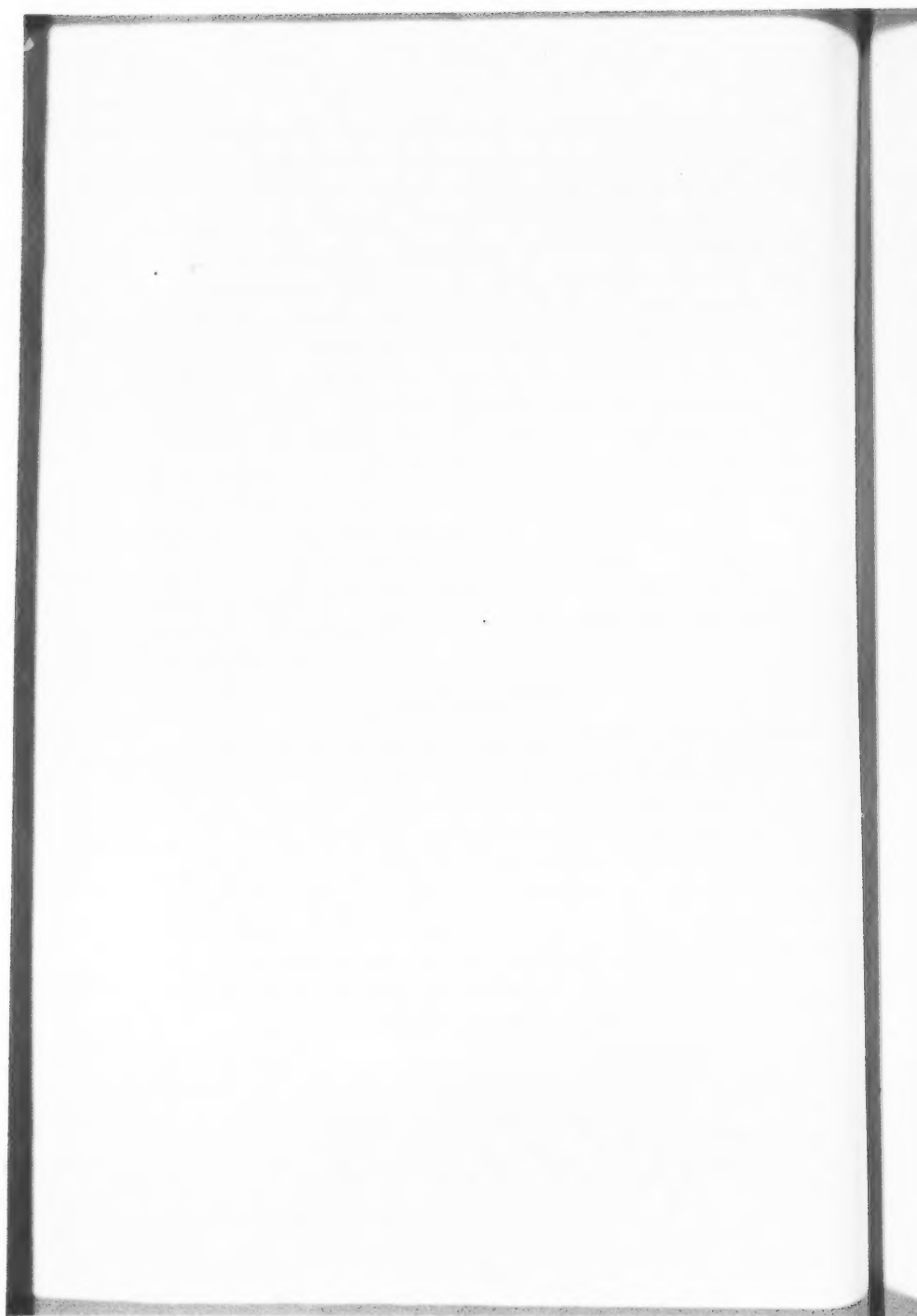
Respectfully submitted,

DONALD R. RICHBERG,
PARK CHAMBERLAIN,
JOHN DERN,

*Attorneys for Respondent,
The United Light and Power Company.*

March 22, 1943.





APPENDIX A

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 6—October Term, 1942

(Argued October 8, 1942, Decided November 12, 1942)

THE NEW YORK TRUST COMPANY, as the Trustee under the Debenture Agreements between it and THE UNITED LIGHT AND POWER COMPANY; MARY A. WALDRON, FREDERICK H. BRUNNER, AMERICAN EQUITABLE ASSURANCE COMPANY OF NEW YORK, KNICKERBOCKER INSURANCE COMPANY OF NEW YORK, NEW YORK FIRE INSURANCE COMPANY, MERCHANTS AND MANUFACTURERS INSURANCE COMPANY OF NEW YORK, and AMERICAN RESERVE INSURANCE COMPANY,

Petitioners,

—against—

SECURITIES AND EXCHANGE COMMISSION AND THE UNITED LIGHT AND POWER COMPANY,

Respondents.

Petition to review an order of the Securities and Exchange Commission. Order affirmed.

Before:

L. HAND, SWAN and CHASE,

Circuit Judges.

HUMES, BUCK, SMITH & STOWELL, Attorneys
for Petitioners;

DONALD R. RICHBERG, PARK CHAMBERLAIN,
JOHN DERN, Attorneys for The United
Light and Power Company;

DAVIES, RICHBERG, BEEBE, BUSICK & RICHARD-
SON; SIDLEY, MCPHERSON, AUSTIN &
BURGESS; of Counsel;

CHESTER T. LANE, Gen. Counsel;

JOHN F. DAVIS, Assistant Gen. Counsel;

HOMER KRIPKE, Sp. Counsel;

ROGER FOSTER, Counsel to Public Utilities Di-
vision;

THEODORE L. THAU, AARON LEVY, of Counsel.

CHASE, *Circuit Judge:*

This petition to review an order of the Securities and Exchange Commission made under the Public Utility Holding Company Act of 1935, 15 U. S. C. §79 (a) *et seq.* was brought by the trustee under two debenture agreements of The United Light and Power Company, and by certain holders of the debentures of that company. The order denied the right claimed by the debenture holders to be paid, upon the dissolution of the corporation under a plan approved by the Commission, a premium in addition to the principal and accrued interest on the bonds.

The corporation, which will herein be called Power, is a registered holding company at the top of a system comprising fifty-two companies of which several are themselves registered holding companies. Its position in this set-up was established previous to the effective date of the above mentioned statute now to be referred to as the Act, and after that took effect the Commission in due course and on March 20, 1941, entered an order under §11 (b) (2) requiring the liquidation and dissolution of Power. This order has become final. Power has undertaken to comply with it and in so doing has made various applications to the Commission for approval of proposed steps to that end with the result that it has ample funds to pay all of its obligations whether or not the premiums here involved are payable.

The order now on review was made upon the application of Power to the Commission for approval of a plan providing *inter alia* for the retirement by the payment of principal and accrued interest only of debenture bonds on dates, far in advance of maturity, as of which Power, had it exercised an option it had in the debenture agreements to call the bonds, would have had to pay a premium of nine per cent. The sole issue now is whether the petitioners are entitled to the same premium which would have been payable upon a call by the corporation.

Much of the elaborate argument of the petitioners becomes irrelevant when once it is realized that the order of March 20, 1941, requiring the liquidation and dissolution of Power was not only clearly within the scope of the statute under which the Commission acted and justified by the facts but having become final has thereby become the fixed point from which to survey the right they now claim. It was the duty of the Commission under §11 (b) (2) (d) and (e) of the Act to supervise the carrying out of its order of dissolution

and to that end it properly entertained applications for its approval of the steps proposed to be taken. How these bonds should be dealt with was one of the questions requiring decision and as such was clearly within the proper scope of a plan to be submitted to the Commission under above subsection (e). The petitioners argue that even so the Commission was powerless to find as the subsection required that the payment of the bonds was "necessary to effectuate the provisions of subsection (b)" if there were alternative ways to dispose of the bonds upon dissolution of the issuing corporation. They suggest that such an alternative would have been to require the holding company to be left at the top of the system to assume them. We need not, however, discuss the virtues or the opposite of that suggestion. Obviously Congress gave the Commission the power, subject to the review provided for its orders, to decide what was necessary in each instance to effectuate the provisions of subsection (b). It is quite as obvious that debenture holders are in no position to question the necessity of a provision in a plan which provides cash for them in exchange for their bonds to the full extent of the contract in the bond and this is especially true of the holders of callable bonds like these. Nor will we disturb a finding of the Commission unless it is clearly erroneous. *Hartford Gas Company v. S. E. C.*, 129 F. (2) 794. Consequently we pass to the substantial question of whether the plan providing for the retirement of the bonds was unfair and inequitable to the debenture holders in failing to require the payment of any premium.

That depends upon the contract rights of the debenture holders under the applicable principles of contract law. We agree with the petitioners that the debenture agreements, in so far as they provided for the payment of principal on dates certain and the payment

of interest at a specified rate to the maturity dates, gave the bondholders the right to insist that the payment of principal should be made only at maturity and interest should be paid until then. *Missouri, K. & T. Ry. Co. v. Union Trust Co.*, 156 N. Y. 592. This right of the bondholders, however, was modified by an option reserved by the obligor to call the bonds and extinguish the right of the bondholders to have their investment continued longer. For the privilege of exercising this option the corporation agreed to pay a premium at a stated rate which would decrease as time elapsed. That is to say, the corporation had the right to shorten the bondholders' period of investment by paying the premium price for so doing. It is abundantly clear that both of these contract rights, the one that of a bondholder and the other that of the corporation, flowed from debenture agreements which contemplated as indispensable the continued existence of the corporation. Such continued existence was needed to enable it to pay from time to time as promised and needed also to give it any inducement when the condition of its affairs might make such payment advantageous to exercise its privilege to pay a stated premium to relieve itself of the burden to pay interest as otherwise agreed.

This continued existence was made impossible by the valid final order of the commission dated March 20, 1941. So much being established, we have no occasion to discuss any more fully the Commission's creation or powers from a constitutional or other viewpoint. We have but to decide the effect on the debenture agreements of a lawful governmental order requiring the obligor to liquidate and give up its existence as a corporation before all payments of interest on the bonds have been made as agreed. Though it has been deprived of its ability to perform strictly, the corporation is in a position to pay the equivalent of the money payments

in the future to be made. Therefore substantial compliance is possible and so it cannot be said that future payments of interest are excused as a matter of law because performance by the payment thereon, discounted or otherwise, has been made impossible by the Commission's dissolution order. Yet the future interest payments are excused because by the order of the Commission, *i. e.*, by governmental power, which neither obligor nor obligee could control or with respect to which they made the contract, the venture has been frustrated. Restatement of Contracts, §§460, 461.

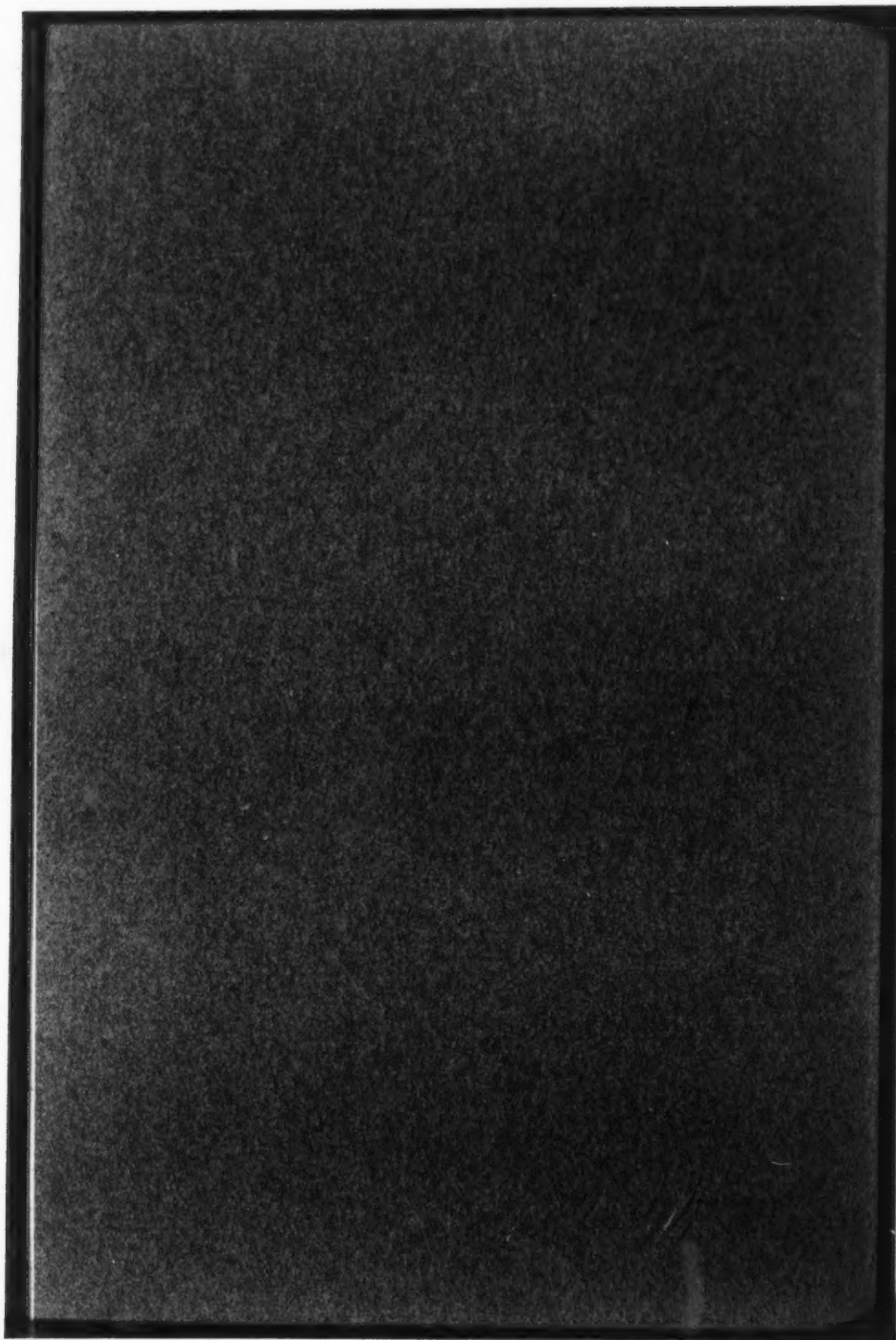
Where, through no fault of either party, something necessary for the continued performance of a contract goes out of existence because of some unforeseen circumstance and none of the parties have assumed that risk the contract is regarded as charged with the implied condition that if what is necessary to performance becomes unavailable the contract is no longer binding and further performance is excused. *Texas Company v. Hogarth Shipping Co.*, 256 U. S. 619; *Chicago, Milwaukee & St. Paul Ry. Co. v. Hoyt*, 149 U. S. 1. This is especially true where, as here, the essential existence of one of the parties to a contract has become illegal and impossible because contrary to a new concept of public policy which was unforeseeable when the contract was made. *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U. S. 324; *Louisville & Nashville R. R. v. Mottley*, 218 U. S. 467.

This involuntary destruction of the corporation deprived it of any freedom of choice except perhaps as to the cost of its funeral. It certainly was not in a position to elect to pay a premium to better its capital structure for continued business purposes. And it certainly was under no obligation to exercise its option to call the bonds if it had nothing to gain by so doing. That motive absent, it might well let the rights of those

in interest be determined as though there had been no call option. The order under review was, accordingly, fair and reasonable to all parties in interest since it provided for the payment of the bonds in a way which discharged in full the contract obligations of the dissolved corporation.

Affirmed.





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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 772

THE NEW YORK TRUST COMPANY, AS THE TRUSTEE
UNDER THE DEBENTURE AGREEMENTS BETWEEN
IT AND THE UNITED LIGHT AND POWER COM-
PANY, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION AND THE
UNITED LIGHT AND POWER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE
COMMISSION IN OPPOSITION

OPINIONS BELOW

The findings and opinion of the Commission (R. 294-315), not yet officially reported, are set forth in the Commission's Holding Company Act Release No. 3658. The opinion of the circuit court of appeals (R. 320-325) is reported in 131 F. (2d) 274.

JURISDICTION

The decree of the circuit court of appeals was entered December 4, 1942 (R. 326). The petition for a writ of certiorari was filed February 27, 1943. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, the provisions of which are made applicable by Section 24 (a) of the Public Utility Holding Company Act of 1935.

QUESTIONS PRESENTED

1. Whether the Commission, after making a valid order directing a registered holding company to dissolve pursuant to Section 11 (b) (2) of the Public Utility Holding Company Act of 1935, has the power pursuant to a plan submitted to it to approve and direct retirement of the company's unmatured debentures upon finding that the retirement is "necessary to effectuate the provisions of said section" and "fair and equitable to the persons affected."

2. Whether the Commission may under such circumstances approve and direct retirement of the debentures at par and accrued interest without payment of the premium specified by the debenture agreement for redemption and without compensation for the termination of the investment.¹

¹ The petition for certiorari states other questions which are embraced within those stated, or are too trivial for separate consideration.

STATUTE INVOLVED

The applicable provisions of the Public Utility Holding Company Act of 1935 are set forth in an Appendix, *infra*, pp. 16-22.

STATEMENT

On December 6, 1940, the date of the commencement of the proceeding in which the Commission's order was entered, United Light and Power Company ("Power") was a registered gas and electric utility holding company at the top of a system embracing fifty-two companies, of which seven were registered holding companies (R. 99-100, 111). Power owned directly the securities of a number of its utility operating subsidiaries, but most of the operating companies in the system were controlled through one or more subholding companies.

The proceeding before the Commission was commenced by notice and order for hearing to determine whether it was necessary under Section 11 (b) (2) of the Act to require the simplification of the system of Power and the discontinuance of the existence of one or more companies in the system (R. 3-9). The petitioners here were given notice of the proceeding by publication (R. 8-9). After hearings (R. 10-90) the Commission on March 20, 1941, issued its findings, opinion and order, finding that the liquidation and dissolution of Power was necessary to comply with the requirements of Section 11 (b) (2) and, particu-

early with the second sentence thereof, commonly known as the "great-grandfather" provision (R. 91-113).² The Commission therefore ordered Power to liquidate and dissolve with due diligence (R. 115-116). The general outlines of a plan of liquidation were described in the Commission's opinion (R. 101-104). No petition to review this order has been filed and the time for review has expired.³

Following the entry of the order of liquidation and dissolution, the Commission approved various applications filed by Power with respect to transactions necessary to carry it out (R. 117-131, 135-176).⁴ The applications were filed under Sec-

² The second sentence of Section 11 (b) (2) provides as follows: "In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company."

The effect of this provision is to require that a holding company system be limited to a maximum of three tiers of companies.

³ Section 24 (a) of the Act provides that a petition for review of an order of the Commission must be filed within sixty days after the entry of the order.

⁴ The record references are to the Commission's findings, opinions and orders on Applications Nos. 1 and 5. Orders granting Applications Nos. 2, 3, 4, 6, and 7 are not in the printed transcript but are a part of the transcript of record certified by the Commission.

tion 11 (e) of the Act as steps in the program for compliance with Section 11 (b) (2) and the Commission's order thereunder.

As a step in this process Power, on January 20, 1942, filed with the Commission its Application (No. 8) under Section 11 (e) to liquidate and retire its outstanding debentures at their total principal amount of \$15,093,800 plus interest accrued to May 1, 1942 (R. 178-185). These debentures were unsecured obligations of Power, issued in three series in 1923, 1924 and 1925, bearing interest until maturity at coupon rates of 6%, 6½%, and 6% respectively, and due by their terms in 1973, 1974 and 1975, respectively.⁵ Under the terms of the debentures and debenture agreements, Power had the "right", "election" and "option" to redeem the debentures in whole or in part before maturity by paying the principal and accrued interest, plus a "premium" in an amount which, at the date of this proceeding, was \$9 on each \$100 principal amount (R. 222, 226, 229), or, in the aggregate, \$1,358,442 on the debentures then outstanding.

⁵ The 1923 debentures had been issued by United Light and Railways Company (of Maine), a predecessor of Power, which was afterward dissolved. Power assumed the obligation of these debentures and issued the 1924 series under the same debenture agreement. The 1925 debentures were issued under a separate agreement. The material provisions of both debenture agreements are substantially identical. For the purpose of this case all of the debentures may be treated as if issued under one agreement.

The Commission held hearings on the application. The New York Trust Company, as trustee for each of the debenture series, and certain debenture holders not parties to the review in the court below, intervened and contended that Power was required to pay either the redemption premium of 9% or compensation for the termination of the investment (R. 286-293, 313-314).⁶ After briefs and argument (R. 243-285, 297), on February 25, 1942, the Commission issued its Findings, Opinion and Order approving the Application under the standards of Section 11 (e); it found that the retirement of the debentures as proposed by Power was "necessary to effectuate the provisions of said section [11 (b) (2)] and to enable Power to liquidate and dissolve in accordance with our order of March 20, 1941," and that the plan was "'fair and equitable' to the persons affected thereby" (R. 294-318).⁷

⁶ In anticipation of this contention, Power's Application further provided that upon entry of an order approving the plan, Power would give notice of payment to all registered owners of debentures; that an escrow agreement would be executed covering the deposit of cash of Power to provide the payment of debenture premium in the event of a reversal of the Commission's order upon judicial review; and that debenture holders surrendering their debentures for payment would not thereby waive the redemption premium if, upon review, it should be determined that they were entitled thereto (R. 184-185).

⁷ On March 4, 1942, Power filed a certificate of notification stating that the transactions described in Application No. 8 had been carried out (R. 319).

On a petition for review, the Circuit Court of Appeals for the Second Circuit affirmed the Commission's order (R. 320-327).

ARGUMENT

The questions presented arise out of a program of corporate simplification required by Section 11 (b) (2) of the Public Utility Holding Company Act of 1935. They and allied questions are recurring and therefore in one sense are important in the administration of the Act. But, it is submitted, there can be no serious doubt of the correctness of the decision upon those issues by the court below; and in *City National Bank & Trust Co. v. Securities and Exchange Commission, et al.*, decided March 5, 1943, the Circuit Court of Appeals for the Seventh Circuit has decided the same issues in the same manner.⁸ Under these circumstances, there would seem to be no occasion for review by this Court.

1. The Commission plainly had power to determine what disposition should be made of the debentures and to direct that they be retired upon finding, as it did, that such a step was "necessary to effectuate" the provisions of Section 11 (b) (2).

Petitioners' arguments that it was not necessary that the debentures be retired in order to

⁸ The opinion is not yet reported but is reprinted in the Appendix, pp. 23-36, *infra*.

comply with Section 11 (b) (2) (Pet. 11-16), that regulation of the debentures was not constitutional under the commerce clause (Pet. 16-17), that such regulation violated the Fifth and Tenth Amendments (Pet. 17-19), and that such regulation violated Section 26 (c) of the Act (Pet. Br. 14-16) are all based on a misunderstanding of the relationship between the order of retirement and the dissolution proceeding in which the order was entered.

The order under attack was entered after an earlier order of the Commission in the same proceeding requiring Power to liquidate and dissolve in order to comply with Section 11 (b) (2) of the Act.⁹ No review of this order had been sought and the order was final. Accordingly, the constitutional and statutory warrant for that order are not now open to challenge.

⁹ The Commission's liquidation order was not, as petitioners contend, based solely on the "great-grandfather clause." Indeed, that clause is by its terms merely a specific application of the broader policies of the balance of Section 11 (b) (2).

The Commission's proceeding was directed to the broad question of what action should be taken by Power and its principal subsidiaries "pursuant to Section 11 (b) (2) of said Act requiring the simplification of the corporate structure of the holding company system of The United Light and Power Company and the simplification of the corporate structure and discontinuance of the existence of one or more companies in said holding company system," and of "what steps and what action is necessary for that purpose" (R. 7-8).

Since an order of dissolution obviously does not of its own force accomplish liquidation and dissolution, it is always necessary to develop a plan for accomplishment of the order in accordance with the rights of creditors and stockholders. Accordingly, the Act makes formulation and superintendence of the program for accomplishing liquidation an integral part of the corporate simplification proceeding. Section 11 (d) provides that where the Commission applies to a court to enforce compliance with its simplification order under Section 11 (b), compliance must be accomplished in accordance with a "fair and equitable" plan which shall have been approved by the Commission. Section 11 (e) provides that where, as in the present case, the company comes forward with a program for simplification in compliance with Section 11 (b), then the Commission shall find whether the plan is necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, and, if it does, shall enter an order approving the plan. Thus, in every case the Commission is required to see that compliance with Section 11 (b) (2) and its orders thereunder is carried out in accordance with a plan which is fair and equitable and in accordance with the rights of the parties. Clearly, therefore, the Act empowers the Commission to determine and adjust the rights of the debenture holders whenever such

an adjustment is an appropriate incident to the corporate simplification. The word "necessary" does not mean absolutely prerequisite; it leaves some scope for discretion.¹⁰ In these provisions the Act carries out the public policy, also expressed in antitrust cases, of protecting the rights of security holders affected by the exercise of paramount public policy exercised under the commerce power (see *United States v. American Tobacco Co.*, 221 U. S. 106, 185).

It is plain, therefore, that the Commission acted within the scope of its statutory powers in the instant case. And since petitioners have conceded—and, indeed, cannot here deny—the validity of the Commission's liquidation order, there can be no serious constitutional challenge to the exercise of power to supervise and direct the detailed steps of the liquidation program, including payment of the debentures, as an incident to the effectuation of the Commission's order and the purposes of the Act. The decisions in antitrust cases show decisively that the federal government has the power to exercise such an incidental jurisdiction in order to implement a broad exercise of the commerce power. *Continental Insurance Co. v. United States*, 259 U. S. 156; *United States v. American Tobacco Co.*, 221 U. S. 106; *Northern Securities Co. v. United States*, 193 U. S. 197; *Standard Oil Co. v. United States*, 221 U. S. 1.

¹⁰ Cf. *McCulloch v. Maryland*, 4 Wheat. 316, 413 *et seq.*

Nor was the action of the Commission unconstitutional because the contract rights of the debenture holders are affected. To show that a reasonable exercise of federal power may result in the termination of antecedent contracts of innocent persons does not establish a denial of due process under the Fifth Amendment or violate the "basic principle underlying the Constitution," as petitioners contend. See *Louisville & Nashville R. R. v. Mottley*, 219 U. S. 467, 480-486; *Philadelphia, etc., R. Co. v. Schubert*, 224 U. S. 603; *United States v. Southern Pacific Co.*, 259 U. S. 214, 234-235; *Norman v. Baltimore & Ohio R. Co.*, 294 U. S. 240; cf. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211. And since the power exercised is granted under the commerce clause, there is no invasion of any rights of the States reserved under the Tenth Amendment. *United States v. Darby*, 312 U. S. 100.¹¹

As to the merits of the Commission's conclusion that the debentures had to be retired, there

¹¹ Petitioners' contention that under Section 26 (c) of the Act the Commission may not terminate contract rights antecedent the Act is obviously unsound. That section, and its correlative, Section 26 (b), specify what securities shall be valid or invalid under the Act with reference to the question whether their issuance complied with the regulatory provisions of the Act. Any restrictive reading of Section 26 (c) denying the Commission the power to terminate securities contracts entered into prior to the passage of the Act would prevent the attainment of the specific objectives of Section 11 (b) (2), which are to deal with, and under certain circum-

can be little question. Disposition of the debentures was obviously an essential part of the liquidation. The Commission found that no disposition was possible other than retirement. It considered ~~ation. The Commission found that no disposition~~ other possible dispositions and found that the assumption of the debentures by any other company in the system was not feasible nor proper as a financial matter and in the light of the standards of the Act (R. 299-301). The findings of the Commission on these points may not be disturbed upon review for there is no showing that the Commission abused its discretion. *Gray v. Powell*, 314 U. S. 402.

2. The remaining question is whether the Commission erred in finding that the plan providing for immediate repayment of principal and accrued interest was fair and equitable to the debenture holders even though it did not require Power to pay them additional compensation for the premature termination of their investment. As matters stood before institution of the proceeding, the debenture holders had a contract right to receive interest until 1973-1975 and the principal

stances to require the liquidation of, holding companies existing when the Act was passed, all of which had securities long ago issued and outstanding. In disposing of the debentures the Commission did not declare them to be invalid and not entitled to be recognized in the liquidation, but merely required their retirement on "fair and equitable" terms as an incident to action necessitated by Section 11 (b) (2).

at that time, subject only to the right of the company to redeem the debentures earlier at an agreed premium. The debenture holders contended before the Commission—as do the petitioners here—that they were entitled to be compensated for the loss of that right. The Commission rejected the claim and its decision, we submit, was plainly sound.

The Commission first considered the debenture agreements and found that properly construed they contained no provision for payment of a premium or other compensation in the event of forced prepayment under the compulsion of a statute passed long after the debentures had been issued. The court below agreed. The provision for a premium in the event of voluntary redemption of the debentures at the “option” or “election” of the company (R. 221, 226, 229, 231–232, 242) is obviously unsuited to describe this situation in which Power was compelled to pay off the debentures to comply with the Commission’s order of liquidation and dissolution.¹²

¹² Indeed, the provisions of the debenture agreements, executed in 1923–1925, could not possibly have envisioned the Commissioner’s order of liquidation and dissolution under Section 11 (b) (2) of the Public Utility Holding Company Act enacted in 1935. Therefore, even if the language of the debenture agreements read literally might be considered as descriptive of the situation, it would not be construed to apply to these circumstances which were not foreseeable when the language was used. *Chicago, Milwaukee & St. Paul Railway Co. v. Hoyt* 149 U. S. 1; *In re Bond & Mortgage Guarantee Co.*, 267 N. Y. 419.

Second, in conformity with general contract law the Commission held that apart from the option provision the debenture holders were not entitled to compensation for the termination of their investment. This determination, which the court below also approved, finds clear support in decisions of this and other courts which uniformly hold that when private contracts entered into prior to the enactment of federal laws are terminated by operation of those laws, neither contracting party is entitled to compensation for breach thereof. *Louisville & Nashville R. R. v. Mottley*, 219 U. S. 467; *Lewis, Leonhardt & Co. v. Southern Ry. Co.*, 217 Fed. 321 (C. C. A. 6); *Elliott Mach. Co. v. Center*, 227 Fed. 124 (W. D. Mich.); *Louisville & N. R. Co. v. Crowe*, 156 Ky. 27; *Cowley v. Northern Pacific Railway Co.*, 68 Wash. 558.

In terminating the debenture holders' right to retain the investment, the Commission necessarily, at the same time, terminated the correlative right of Power and its stockholders to use the borrowed capital until maturity upon payment of interest for its use. Thus, the whole agreement between Power and its debenture holders was frustrated by operation of law. Under such circumstances the debenture holders were not entitled to compensation. A promisee is not entitled to compensation for the loss of his bargain when the promisor has been denied his expected benefits as a

result of the elimination, under the impact of a domestic law, of an essential factor which both parties assumed would continue—the lawful existence of Power, in the instant case. *Texas Company v. Hogarth Shipping Company*, 256 U. S. 619; *Lorillard v. Clyde*, 142 N. Y. 456; *Heart v. East Tennessee Brewing Co.*, 121 Tenn. 69; *Adler v. Miles*, 126 N. Y. Supp. 135 (Sup. Ct. App. T.); *McCullough Realty Co. v. Laemmle Film Service*, 181 Ia. 594; *Industrial Development & Land Co. v. Goldschmidt*, 56 Cal. App. 507; *Doherty v. Monroe Eckstein Brewing Co.*, 187 N. Y. Supp. 633 (Sup. Ct. App. T.); *Wischhusen v. American Medicinal Spirits Co.*, 163 Md. 565; *King Features Syndicate, Inc. v. Valley Broadcasting Co.*, 43 F. Supp. 137 (N. D. Tex., 1942); *Restatement of the Law of Contracts*, §§ 288, 458; 6 Williston, *Contracts* § 1938 (Rev. Ed. 1938).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

JOHN F. DAVIS,
Solicitor, Securities and Exchange
Commission.

MARCH, 1943.

APPENDIX

Public Utility Holding Company Act of 1935,
49 Stat. 803, 15 U. S. C. 79 *et seq.*:

SEC. 11. (b) It shall be the duty of the
Commission, as soon as practicable after
January 1, 1938:

* * * * *

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corpor-

ate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

(c) Any order under subsection (b) shall be complied with within one year from the date of such order; but the Commission shall, upon a showing (made before or after the entry of such order) that the applicant has been or will be unable in the exercise of due diligence to comply with such order within such time, extend such time for an additional period not exceeding one year if it finds such extension necessary or appropriate in the public interest or for the protection of investors or consumers.

(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so pos-

sessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such

plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

* * * * *

SEC. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served

upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the

United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

* * * *

SEC. 26. (a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or with any rule, regulation, or order thereunder shall be void.

(b) Every contract made in violation of any provision of this title or of any rule, regulation, or order thereunder, and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title, or any rule, regulation, or order thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, regulation, or order.

(c) Nothing in this title shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this title, unless at the time of the mak-

ing of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of which the making of such loan or extension of credit (or extension or renewal thereof) or the acquisition of such lien is a violation of the provisions of this title or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this title or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien.

In the United States Circuit Court of Appeals
for the Seventh Circuit

No. 8106—October Term, 1942, January Session,
1943

CITY NATIONAL BANK AND TRUST COMPANY OF
CHICAGO, AS SUCCESSOR TRUSTEE, ETC., PETITIONER

vs.

SECURITIES AND EXCHANGE COMMISSION AND NORTH
AMERICAN LIGHT & POWER COMPANY, RESPOND-
ENTS

Petition for Review of Order of the Securities
and Exchange Commission

March 5, 1943

Before MAJOR, KERNER, and MINTON, *Circuit
Judges.*

MAJOR, *Circuit Judge.* This is a petition to review an order of the Securities and Exchange Commission, entered July 10, 1942, under the Public Utility Holding Company Act of 1935 (hereinafter called "the Act"), 49 Stat. 803, 15 U. S. C. § 79a *et seq.* The order approved an application (called Application No. 2) filed by the respondent, North American Light and Power Company (called Light and Power), for authority to retire its outstanding publicly held debentures, for which petitioner was a successor trustee.

Light and Power, incorporated in 1924 under the laws of Delaware, is a subsidiary of the North American Company (called North American), both of which are holding companies registered under the Act. North American owns 85% of Light and Power's common stock, 43% of its preferred stock and 62.4% of its debentures.

The proceeding was instituted by the Commission on December 2, 1941 to determine, among other things, whether under Sec. 11 (b) (2) of the Act an order should be entered requiring the liquidation and dissolution of Light and Power, and the distribution of its assets to its security holders in accordance with a fair and equitable plan. On December 30, 1941, the Commission, in conformity with its findings and opinion that the continued existence of Light and Power was in violation of the Act and that liquidation and dissolution were necessary to comply therewith, entered its order that Light and Power be liquidated and its existence terminated. Light and Power was directed to proceed with due diligence to submit to the Commission a plan or plans for its prompt liquidation and the termination of its existence in a manner consistent with the provisions of the Act. (The period within which this order could be reviewed has expired. Sec. 24 (a) of the Act.)

Among the applications filed by Light and Power for approval of steps necessary to carry out the required liquidation was Application No. 2, upon which the order under review was predicated. Of the outstanding debentures, the principal amount of \$3,376,500 was held by the public and \$5,623,500 held by North American (the parent of Light and Power). The application proposed the retirement of the former by payment of the principal amount of such debentures with interest accrued to July 1, 1942, but without payment of any premium.¹ It was not proposed to pay off

¹ The application provided that the debenture holders accepting principal and accrued interest would not be deemed

the debentures held by North American at the same time for the stated reason that questions had been raised as to the right of North American to be paid on the same basis as the public holders. The Commission, in its order approving the application, found that immediate retirement of the publicly held debentures was practical and necessary to effect the provisions of Sec. 11 (b) (2) and to enable Light and Power to liquidate and dissolve in accordance with the order of December 30, 1941, and was fair and equitable to the persons affected thereby. Interest was allowed upon the debentures until August 21, 1942 and thereafter the debenture holders were paid amounts equal to the principal plus interest accrued to that date.

The primary question for decision is whether the order authorizing the retirement by Light and Power of its publicly held debentures, without the payment of premium, is valid and lawful. It is the contention of the Commission that payment of a premium was required only in the event of their voluntary retirement, that such requirement is not applicable to the instant situation because the retirement was involuntary—necessitated by the Commission's order requiring liquidation and dissolution of the corporation. In this connection, it is also contended that the purpose of the debenture agreement was frustrated and rendered impossible of attainment by the supervening mandate of the Act and the Commission's order thereunder. On the other hand, petitioner contends that the debenture holders had a contractual right

to have waived the redemption premium if it should be determined upon review of the Commission's order that they were entitled to such premium.

to the redemption premium, of which they could not be legally deprived. In this connection, it is argued that the retirement of the debentures was the voluntary act of Light and Power, but that even if involuntary, they could not be deprived of the benefit of the redemption provision. To do so, it is urged, is violative of Sec. 26 (c)² of the Act, and the Fifth Amendment of the United States Constitution.

In the beginning, we think it may be assumed that an order of the Commission which impaired or destroyed a property right fixed by contract would violate Sec. 26 (c) of the Act. Furthermore, such an order would not be "fair and equitable to the persons affected by such plan," as required by Sec. 11 (e) of the Act. *Case v. Los Angeles Lumber Co.*, 308 U. S. 106, 114; *Consolidated Rock Co. v. DuBois*, 312 U. S. 510. Petitioner's contention in this respect, however, carries little, if any, force, because he must, as we view the matter, stand or fall on the issue as to whether Light and Power was obligated by contract to pay a premium on redemption under the circumstances with which it was confronted.

We shall first consider petitioner's contention that the Commission erroneously determined that the dissolution was the result of a "compulsory liquidation by Congressional mandate." In support thereof, certain acts and events which trans-

² This section provides that "nothing in this title shall be construed (1) to affect the validity of any loan or extension of credit * * * made or of any lien created prior or subsequent to the enactment of this title unless at the time of the making of such loan or extension of credit * * * (Circumstances enumerated not here material)."

pired prior to the Commission's liquidation order of December 30, 1941, are relied upon. Briefly, the record discloses that during a hearing in a proceeding instituted by the Commission against North American (parent company), it developed that a continuation of the then existing status of Light and Power was doubtful. On May 9, 1941, the directors of Light and Power adopted a resolution, proposing to the stockholders that the corporation be dissolved. It is admitted that this action was influenced by the prospective application of the Act, but it is urged that other factors were determinative. The president of Light and Power by affidavit stated, in effect, that the directors decided there was no economic justification for the continued existence of the company and that it would have been liquidated, irrespective of the Act.

It was decided to dissolve under the Delaware Corporation Law and to liquidate under the direction of a Chancery Court of that state. The stockholders of Light and Power were so notified. It is disclosed that the Commission opposed the proposed liquidation action in the state court, and on June 3, 1941, entered an order prohibiting North American from voting its stock at the proposed dissolution meeting and prohibiting Light and Power from holding the stockholders' meeting. On the following day, the Commission instituted proceedings in the United States District Court of Delaware, seeking to enjoin Light and Power and North American from violating the provisions of its order. It is claimed that dissolution in the state court, except for interference by the Commission, would have been certain inas-

much as North American, which owned sufficient shares to insure passage of the dissolution resolution, had agreed to vote its shares in favor thereof. Further action was held in abeyance until December 2, 1941, when the Commission ordered that a hearing be held on December 22, 1941 for the purpose of considering whether an order should be entered requiring liquidation by Light and Power. Counsel at this hearing stated that the appearance of Light and Power was without prejudice to the dissolution proceeding pending in the Delaware Court. It was at the termination of this hearing that the Commission on December 30, 1941 entered its liquidation order which resulted in the filing on April 30, 1942 by Light and Power of its Application No. 2, seeking authority from the Commission for its proposed plan of liquidation.

Reference to legal textbooks, digests, etc. is convincing that it is difficult to define with exactitude the word "voluntarily." We think it can be safely said that whether an act is voluntarily performed depends not merely on the act of performance but upon the attending circumstances and conditions. Petitioner suggests as analogous to the asserted voluntary action of Light and Power the action of a person subject to the draft who enlists in the military service. Assuming the pertinency of this analogy, we doubt if it is of any benefit to petitioner. It does illustrate, however, that the character of the act depends upon the circumstances under which it is performed. For instance, a person subject to draft who because of age, deferred classification, or other

reason has only a remote possibility of being called for service, who nevertheless enlists, could well contend that such enlistment was voluntary action on his part. On the other hand, what can be said of a person subject to draft who enlists at a time when he knows that he is to be called immediately or at an early date? Of course, he would be known as a volunteer, as that term is commonly understood, but would such enlistment be voluntary action on his part? It is possible that it might be, but the circumstances would strongly militate against such a conclusion. If his draft status as determined by law was the thing which caused, induced or prompted the enlistment or substantially contributed thereto, then we think it could not be said that his action was voluntary.

So in the instant case, the mere naked acts of the officials of Light and Power with reference to dissolution affords some basis for the assertion that it was a voluntary dissolution. Such acts, however, when considered in connection with the circumstances, are well near stripped of all potency. For some eight years the corporation had existed in a dormant condition, with business activities of such a meager nature as to require the services of only one paid officer and one employee. It is strikingly significant, so we think, that it apparently did not occur to it that its interest lay in dissolution until after the enactment of the Act, nor even then until the Commission had instituted proceedings against North American, its parent corporation, which owned a large part of its bonds and stocks. It is more

than a reasonable—it is an inescapable—inference that its sudden impulse to dissolve was born of the knowledge as to the requirements of the law. Faced squarely with what must have been thought to be the inevitable, it was decided to take action which could have as well been taken years before. We think there is no doubt but that the Commission was justified in finding that such action was the result of legal compulsion rather than the voluntary act of the corporation.³ Such finding is not impaired by the fact that the corporation was agreeable to and acquiesced in that from which there was no escape. Neither is it important that the dissolution proceeding in the state court was stayed by the hand of the Commission. It is unquestioned that the Commission was the designated authority and charged with responsibility of fixing the terms and conditions of dissolution. Furthermore, the acts of the parties in the state court, as well as those prior thereto, are of little consequence because the order now under review was the direct result of the Commission's dissolution mandate contained in its order of December 30, 1941, from which no review was sought and which now must be treated as the operative cause of the liquidation proceeding.

Incidental to and in support of its contention that the dissolution was voluntary, petitioner advances a theory that at the time the order under review was entered there was no prospect of im-

³ Sec. 79 (x) (U. S. C. A.) provides: "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

mediate liquidation and no assurance that the same could be completed within any certain time. From this premise, it is argued that action by the corporation toward dissolution at the particular time was its free act, even though it might at some time in the future have been compelled to dissolve. In other words, it is asserted that the Commission's order of December 30, 1941 merely required a certain result and that the manner of arriving at the result remained in the control of the corporation. We suppose in the narrow aspect of the situation that this is true, but viewing the matter as a whole, we think the contention is without merit. After all, Application No. 2 was filed in compliance with the Commission's mandate, and we think it relatively unimportant that as one step in the dissolution the Application contained the request for authority to retire one class of debentures on a certain date rather than some other date a few months later.

Thus we come to the principal question presented, that is, whether the debentureholders had a contract right to the payment of a premium upon redemption of the debentures occasioned by the involuntary act of Light and Power. In other words, did the order of the Commission which required the payment of the debenture principal plus accrued interest without payment of premium violate a contract obligation?

The debentures were issued under an Agreement dated July 1, 1926. They bear interest at the rate of $5\frac{1}{2}\%$ per annum and mature by their terms on July 1, 1956. Sec. 2 of the Agreement provides: "The debentures * * * shall be

redeemable at the option of the company * * * at the principal amounts, together with premiums as follows * * * one and one-half percent ($1\frac{1}{2}$) of the principal amount of debentures redeemed after July 1, 1941, and on or before July 1, 1946 * * *." Sec. 23 provides: "Such of the debentures * * * as are, by their terms, redeemable before maturity may, at the option of the company, be redeemed at such times, etc."

There can be little, if any, doubt, so we think, but that the provisions concerning redemption had to do solely with voluntary action on the part of the corporation. The debentureholder was without right to require redemption. That was a right accorded to the corporation, to be exercised solely "at the option of the company." It is only upon the exercise of such option that the agreement requires the payment of a premium. Such option lodges in the corporation the discretion to mature the debentures at a date earlier than that otherwise provided. While it is true that the payment of premium was a form of compensation to the debentureholders, nevertheless the redemption provision was for the benefit of the corporation, which could be utilized only at its election. The language plainly indicates that the parties did not contemplate that the redemption provision should be effective upon action by the corporation as a result of the Commission's order. Action under legal compulsion is the antithesis of action by election or "at the option" of the moving party.

Numerous authorities are cited and discussed relating to the doctrine of impossibility of contract performance and the closely allied doctrine of frustration of purpose. In the recent case of *New York Trust Co. et al. v. Securities and Exchange Commission*, 131 Fed. (2d) 274, the court rejected the contention that the contractual provisions for redemption premium were applicable. The questions presented and decided in that case are almost identical with those of the instant case, and the cases relied upon here were in the main considered. Inasmuch as we agree with both the reasoning and the result in that case, we think no good purpose could be served by a discussion of such cases.

Petitioner's effort to distinguish the New York Trust Co. case rests largely on the contention that the court there had before it a situation wherein the liquidation was involuntary, while here the proceeding was the result of voluntary action. As already shown, the action in the instant case was involuntary; hence this asserted distinction fails. In this connection, we refer to another provision of the debenture agreement which petitioner asserts shows the intention of the parties that the redemption provision was to be given effect upon dissolution, irrespective of the occasion therefor. It is Sec. 50 of Article X, entitled "Successors and Assigns." It provides: "Subject to the proviso hereinafter in this section set forth, it is agreed that if the company shall convey and transfer all or substantially all of its property * * * in connection with or as a result of which the company shall be dis-

solved and its affairs shall be wound up or liquidated upon terms providing that cash shall be distributed among stockholders of the company * * * the principal of all debentures issued hereunder and then outstanding shall become immediately due and payable, at their redemption price * * *." We are of the view that there is nothing in the language of this section inconsistent with the interpretation which we have placed upon Sec. 2. It appears that this section was to meet a situation wherein the corporation was being dissolved or liquidated by conveyance or transfer of "all or substantially all of its property as a whole or in parcels" to an assignee or successor concern, rather than by a dissolution as a result of legal compulsion. In any event, there is nothing in the language to indicate that the parties intended that it should be applicable to an involuntary dissolution; in fact, the language indicates to the contrary, and is, therefore, consistent with the language of Sec. 2.

Lastly, petitioner argues that the authorization for the retirement of the publicly held debentures was not "fair and equitable," as required by Sec. 11 (e) of the Act. In this connection, it is asserted that after the retirement of the publicly held debentures, in the principal amount of \$3,376,500, there remained as outstanding \$5,623,500 of debentures, with a continuing obligation to pay interest at 5½%. It is claimed that because of a provision in the debenture relative to partial redemption the debentures redeemed should have been determined by

lot. Such provision, no doubt, would have been controlling in case of a voluntary dissolution, but we think it is without effect in the instant situation. Neither do we think that the action of the Commission discriminated against the publicly owned debentures merely from the fact that it did not order the redemption of all debentures at the same time or that some time may elapse before the debentures held by North American are redeemed. We are bound to take note of the fact that in a proceeding such as the instant one, many difficult and complicated questions are calculated to arise, which must be determined before liquidation can be finally completed. Without going into detail, the record discloses that numerous legal questions must be determined, arising as a result of the relation existing between Light and Power and North American, its parent corporation. Until such questions are solved, it is not possible to know the exact status of North American as a holder of debentures, including the basis on which it is entitled to receive payment. We cannot assume that the Commission in its future actions will accord to the debentures held by North American a more favorable status than it has accorded the debentures in suit. In fact, we think we must assume to the contrary.

Light and Power, at the time of the entry of the order under attack, had approximately \$4,000,000 of cash available for the calling of its debentures, of which it had some \$9,000,000 outstanding. Thus, it had cash in an amount slightly more than sufficient to pay the publicly held de-

bentures. The Commission was confronted with the proposition of authorizing their payment or permitting this cash to lie idle. As we view the situation, the Commission's action was neither unreasonable nor arbitrary. Moreover, the contractual rights of the debentureholders having been recognized and satisfied, they have no cause to complain.

The order of the Commission is affirmed.

A true Copy:

Teste:

_____,
*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*





19
No. 772

MAR 25 1943

CHARLES ELMORE COOPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1942

THE NEW YORK TRUST COMPANY, as the Trustee under the
Debenture Agreements between It and THE UNITED
LIGHT AND POWER COMPANY, and others,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION and THE UNITED
LIGHT AND POWER COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF



IN THE
Supreme Court of the United States

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CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

We are constrained to make the following comments in connection with the briefs submitted on behalf of the respondents:

1. We fully agree with the statement on page 7 of the Commission's brief to the effect that the questions presented "are recurring and therefore in one sense are important in the administration of the Act"; although, of course, we would not qualify the statement with the phrase "in one sense"—whatever that may mean.

2. Both respondents evade the all-important question of Section 26(c) which controls the entire Act. Through wishful thinking, the Commission, by a vague footnote at page 11 of its brief, which begs the question, and Power, by its complete silence, seek to eliminate any consideration of the immensely important question posed by the plainly-spoken will of Congress in Section 26(c) of the Public Utility Holding Company Act of 1935 which, in unmistakable terms, prohibits the very thing which the Commission's order of February 25, 1942 attempts to do to valid antecedent contract rights of the debentureholders.

26(c) provides as follows:

Nothing in this title shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this title, unless at the time of the making of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of which the making of such loan or extension of credit (or extension or renewal thereof) or the acquisition of such lien is a violation of the provisions of this title or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this title or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien.

Paraphrase cannot add to the clarity of that provision. It declares not only that (1) *nothing* in the Act can be construed to diminish the solemn obligation of the debentures but *also* that (2) *nothing* in the Act can be employed to afford a defense to the collection of the debt or obligation

of the debentures. The provision is discussed under Point IV (pp. 14-16) of our main brief.

In the very face of this Congressional edict the Commission and Power persist in arguing that the operation of the statute does in fact afford a defense to valid antecedent contract rights of the debentureholders.

It is understandable that the Commission, through excessive zeal, and that Power, through obvious self-interest, can blind themselves to the written limits of delegated power. But it is truly amazing that the Court below upon a judicial review of such delegated power has completely ignored and has failed to discuss this controlling provision of the statute.

The 6100 holders of Power's debentures and the thousands upon thousands of funded debt creditors of other public utility holding companies similarly situated cannot but be dismayed and bewildered by a ruling which, if allowed to stand, constitutes on its face a defiance of the express will of Congress. *If Section 26(c) does not mean what it says, then what does it mean?*

Our views on the applicability of Section 26(c) have the support of the Seventh Circuit Court of Appeals in *City National Bank & Trust Co. v. Securities and Exchange Commission*, decided March 5, 1943 (subsequent to the filing of our main brief), wherein the Court said:

"In the beginning, we think it may be assumed that an order of the Commission which impaired or destroyed a property right fixed by contract would violate Sec. 26(c) of the Act."

To our knowledge no other court has commented on Sec. 26(c).

The Commission's brief (p. 12) gives full recognition to the existence of the contract rights of the debentureholders to receive interest until 1973-75, subject only to the right of the obligor to redeem the debentures earlier at an agreed premium. The existence of those rights was recognized also in the opinion of the Court below (R. 323).

Those are the antecedent contract rights to which we refer above. That makes it unanimous. All parties here, and the Court below, agree upon the validity of these contract rights.

Confusion will pile on confusion until this Court defines the significance of Sec. 26(c).

3. In Power's brief (pp. 5, 13) it is stated that the arguments of the petitioners are in large part an attack on the validity of the dissolution order. That is wholly incorrect. The attack is not upon the validity of the dissolution order of March 20, 1941 but upon the Commission's unjustified attempt to enlarge the scope of that order. The dissolution order was designed to simplify Power's system by separating Power from the system, which objective was attainable without impairing contract rights of the debentureholders. The attack is not directed to that point in the proceedings but to the subsequent point at which the Commission attempted by its order for the retirement of the debentures to enlarge the scope of the dissolution order with the result of destroying antecedent contract rights of the debentureholders. That is the point at which the debentureholders were "aggrieved". What the petitioners are now seeking is the modification of the order for the retirement of the debentures (not the dissolution order) as prayed in the petition filed in the Court below (R., p. X).

What a hollow mockery would be the statutory provision for judicial review, if as the respondents suggest, the debentureholders were precluded from a review of the order by which they were first aggrieved, just because they did not apply for a review of the dissolution order which did not affect their contract rights!

* 4. On pages 9 and 10 of Power's brief there are statements as to certain special circumstances regarding the debentures and the "financial losses" of the stockholders. The statements are not relevant to this application for certiorari, which is not concerned with any special circumstances which happen to be present in this case but is

concerned with the importance which the legal questions involved have in the administration of the Act. When certiorari is granted, we shall point out in our brief upon review that the above-mentioned statements as to special circumstances are incomplete, and we shall mention additional circumstances which show what the situation is.

We submit that, notwithstanding the opposition of the respondents, certiorari should be granted.

Respectfully submitted,

BEN LEROY STOWELL
IRWIN L. TAPPEN

March 24, 1943.



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U.S. Supreme Court, U. S.
FILED
MAY 5 1943
CHARLES CLAUDE CASPLEY
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1942

No. **772**

THE NEW YORK TRUST COMPANY, as the Trustee under the
Debenture Agreements between it and THE UNITED
LIGHT AND POWER COMPANY; MARY A. WALDRON, FRED-
ERICK H. BRUNNER, AMERICAN EQUITABLE ASSURANCE
COMPANY OF NEW YORK, KNICKERBOCKER INSURANCE
COMPANY OF NEW YORK, NEW YORK FIRE INSURANCE
COMPANY, MERCHANTS AND MANUFACTURERS INSURANCE
COMPANY OF NEW YORK, and AMERICAN RESERVE INSUR-
ANCE COMPANY,

Petitioners,

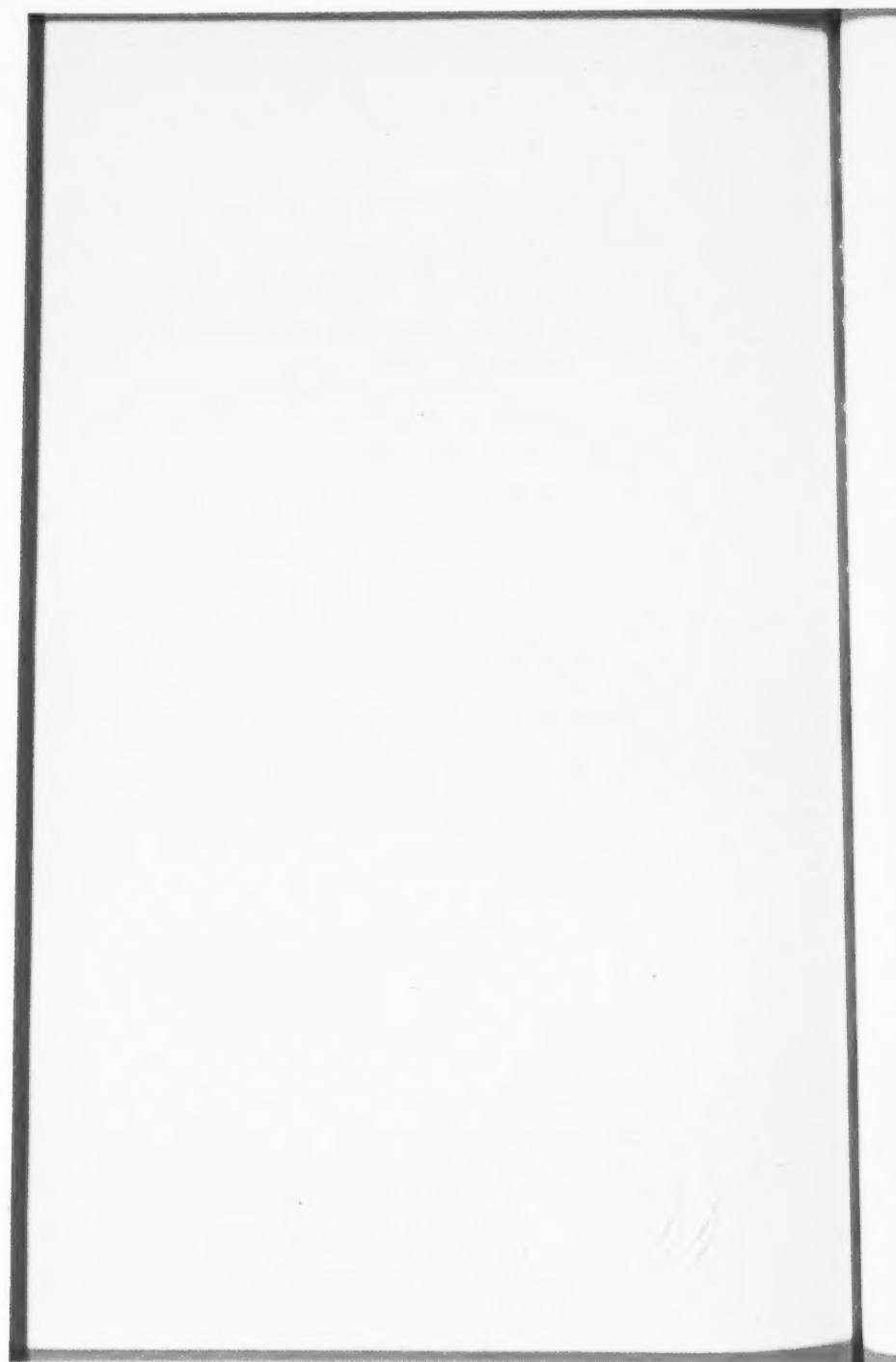
against

SECURITIES AND EXCHANGE COMMISSION and THE UNITED
LIGHT AND POWER COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR REHEARING, WITH ALTERNATIVE MOTION TO
DEFER CONSIDERATION THEREOF

BEN LEROY STOWELL,
IRWIN L. TAPPEN,
For Petitioners.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1942

THE NEW YORK TRUST COMPANY, as the Trustee under the
Debenture Agreements between it and THE UNITED
LIGHT AND POWER COMPANY; MARY A. WALDRON, FRED-
ERICK H. BRUNNER, AMERICAN EQUITABLE ASSURANCE
COMPANY OF NEW YORK, KNICKERBOCKER INSURANCE
COMPANY OF NEW YORK, NEW YORK FIRE INSURANCE
COMPANY, MERCHANTS AND MANUFACTURERS INSURANCE
COMPANY OF NEW YORK, and AMERICAN RESERVE INSUR-
ANCE COMPANY,

Petitioners,

against

SECURITIES AND EXCHANGE COMMISSION and THE UNITED
LIGHT AND POWER COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR REHEARING, WITH ALTERNATIVE MOTION TO
DEFER CONSIDERATION THEREOF

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

The filing of this petition has been made advisable by
the happening of certain important events since the peti-
tion for writ of certiorari (No. 772, October Term, 1942)
was submitted.

The petition for writ of certiorari questioned, among
other things, the power of the Commission to make its
order for the retirement of the debentures of The United

Light and Power Company (called Power) in a proceeding for its dissolution under Section 11(b)(2) of the Public Utility Holding Company Act. It was contended that the assumption of that power by the Commission was in contravention of the Constitution, that in the absence of any finding or showing of relationship between the rights represented by the debentures and interstate commerce, the Commission, as an agency of the national government, did not have power to deal with the debentures, and that such action by the Commission had violated valuable contract rights of the debentureholders in contravention of the Fifth and Tenth Amendments of the Constitution (pp. 16, 17). That petition also raised the question whether there should not have been a single, comprehensive plan for the liquidation and dissolution instead of a series of "plans" for successive steps, and it was pointed out how the lack of such a single plan had been detrimental to the debentureholders (pp. 26, 27).

One of the above-mentioned events happening since the petition for writ of certiorari was submitted was a decision by the Commission in this very matter of the dissolution of Power, in which the Commission, in dealing with the rights of the stockholders, announced and followed a rule for determining the participation of security-holders in this matter and in all reorganizations and dissolutions under Section 11 of the Act which is directly contrary to the principle applied by the Commission in dealing with the rights of the debentureholders (S. E. C. Holding Company Act Release 4215, April 6, 1943).

The second event referred to above was the coming on for argument on the calendar of this Court of the case of *The North American Company*, Petitioner, v. *Securities and Exchange Commission*, Respondent (No. 721), on writ of certiorari to the Circuit Court of Appeals for the Second Circuit, which raises questions the decision of which may be determinative of the constitutional questions raised in the petition for writ of certiorari.

The third, and last, event referred to above is the submission of briefs to the United States Circuit Court of

Appeals for the First Circuit in the case of *American Power & Light Company*, Petitioner, v. *Securities and Exchange Commission*, Respondent (No. 3823), in which case the constitutionality of Section 11(b)(2) of the Act is questioned.

The Recent Decision of the Commission

At the time our petition for writ of certiorari was submitted to this Court, the Commission had under advisement a plan (presented by Power pursuant to the dissolution order) for another step in the liquidation proceedings. Under that plan Power's stockholders would share in the distribution of its holdings of common stock in The United Light and Railways Company (Delaware). A few days after the certiorari petition was submitted, the Commission released its opinion on that plan, announcing and applying a rule for determining the participation of security-holders in the matter of the dissolution of Power as well as in **all dissolutions and reorganizations under Section 11 of the Public Utility Holding Company Act** (excerpts from the opinion furnished herewith as an appendix). That rule is the opposite of the rule which was applied in dealing with the rights of the debentureholders.

The rule which has now been announced for determining the participation of security-holders under Section 11 is substantially this: The security-holders affected "should be given participations according to their contractual or other rights determined *as though in a continuing enterprise*" and not "as though in liquidation" and "the measure of participation allowed should compensate for the substantive rights of security-holders as they would exist apart from" the dissolution or reorganization (excerpts, pp. 3, 4) such rights to be "measured not in terms of the situation created by the statute but rather in terms of the situation terminated by it—*i. e.*, as though no liquidation were to take place" (excerpts, p. 8).

That rule is directly contrary to the principle upon which the Commission fixed the participation of the debentureholders. Such participation was not fixed according to the rights of the debentureholders "determined as though in a continuing enterprise". The Commission definitely refused to allow the debentureholders to participate on that basis. It restricted them to a lesser participation deemed by the Commission to have been determined as though in liquidation, not as though in a continuing enterprise (R. 303-305).

In dealing with the debentureholders the Commission was called upon to decide what effect would be given to the contract right of the debentureholders to receive the interest upon their debentures until the specified maturity date—"if the redemption provisions are held inapplicable so that the debentures are treated as being in effect non-callable" (these being the words of the Commission in its opinion on the plan for the retirement of the debentures—R. 313). The Commission refused to give any effect to that contract right to future interest, giving as its reason (R. 313, 314) "that the termination of the investments of debentureholders and stockholders alike has been brought about by the act of a sovereign power—in this case a Congressional mandate" (the statute). Thus the Commission measured the rights of the debentureholders in terms of the situation created by the statute rather than in terms of the situation terminated by it, which is the opposite of the rule recently announced and applied by the Commission in dealing with the stockholders.

In footnote 15 of its Holding Company Act Release 4215 (excerpts, p. 4), the Commission refers to its decision as to these debentureholders and says:

"Our decision was based on the absence of any provision in the debenture agreements giving the holders a contract right to a premium under the circumstances presented. Thus we were not called upon to decide, and did not consider, what effect would be given to such a contract right if it had existed."

That, however, is only a part of the story. Even assuming that the Commission was not called upon to decide what effect would be given to a contract provision for a redemption premium, still the fact is that the Commission was called upon to decide, and did consider, what effect would be given to the contract right of the debentureholders to receive interest upon their debentures until the specified maturity, and the Commission treated that right "in terms of the situation created by the statute", contrary to the rule now followed by the Commission.

The Circuit Court of Appeals, in reviewing the order for the retirement of the debentures, followed the rule which the Commission had applied. While it recognized the existence of the right of the debentureholders to future interest payments, it held that such payments were excused because "by governmental power * * * the venture has been frustrated" (R. 324). In other words, the court treated the right to future interest payments "in terms of the situation created by the statute" and not according to the rights of the debentureholders "determined as though in a continuing enterprise."

Moreover, in dealing with the participation of the debentureholders, the Commission followed the assumed analogy of a liquidation in bankruptcy (R. 305, 309), whereas in dealing with the participation of the stockholders it said (excerpts, p. 6): "* * * the situation before us is (as we have seen) not comparable to the situation found in bankruptcy."

Furthermore, the rule of participation which was applied to the debentures was not applied to Power's First Lien and Consolidated Mortgage Bonds (Certiorari Petition, p. 26).

The situation created by the Commission's change of position has a special relation to Question 9 presented by the petition for writ of certiorari: "Should there not have been a single, complete plan and a finding by the Commission that such plan was fair and equitable to the persons affected thereby?"

It is hardly conceivable that if there had been a single, comprehensive plan, the Commission would have failed to apply the same rule of participation to all security-holders. The anomalous situation which has arisen here seems to be due largely to the questionable procedure of the Commission in accepting a series of "plans" at intervals instead of requiring a single, comprehensive plan. If such procedure is permitted, the way is opened for unfair and inequitable results.

Thus the order for the retirement of the debentures was made by the Commission, and sustained by the Circuit Court of Appeals, upon a principle which the Commission now holds is not applicable in the proceeding in which the order was made. That alone, we submit, is sufficient reason for granting this petition for rehearing now.

However, if the Court is of the opinion that this petition should not be granted now, the petitioners suggest, and move, that the decision thereon be deferred pending the decisions in *The North American Company* case and the *American Power & Light Company* case referred to herein.

The North American Company Case

As stated above, this case has been reached for argument on the calendar of this Court. Presumably it is about to be argued. The basis of Section 11(b) of the Act is attacked by The North American Company and by *amici curiæ*. If their arguments prevail in this Court, it will mean that the Commission is without authority to direct the liquidation of Power. Although their arguments are directed specifically against Section 11(b)(1), they apply with full force to every provision of Section 11(b), including the clause of Section 11(b)(2) under which the liquidation of Power is proceeding.

In the brief of *amici curiæ*, it is said:

"The companies we represent contend in the proceedings against them, (1) that Section 11(b) (including Section 11(b)(1) and Section 11(b)(2)) is uncon-

stitutional, in that it does not rest, or even purport to rest, on any federal power, such as the power over interstate commerce, and (2) that Section 11(b) (including Section 11(b)(1) and Section 11(b)(2)) is unconstitutional in that it violates the due process clause of the Fifth Amendment. These are the principal issues on the present appeal, and the above-mentioned contentions made in other pending proceedings by the companies we represent will necessarily be affected by the decision in this case."

It is contended in *The North American Company* case that Section 11(b)(1) is invalid for these reasons, among others:

In this subsection there is no plain connection with any Federal power, and Congress made no finding to connect the subsection with any Federal power. The Commission was not directed to make, and did not make, any such finding; and this Court upon inspection of the subsection and related provisions of the Act will see for itself that operation of this statute is plainly not an exercise of the commerce power or any other Federal power, and is not in any way limited in its effect to interstate commerce or matters affecting interstate commerce.

These contentions are similar to certain contentions made in the case at bar and set forth at the beginning of this petition. **The underlying contention is that there is a fundamental lack of power in the national government to enact this statute applying to companies and securities issued by them, irrespective of their being in, or affecting, interstate commerce.**

Is it not highly advisable to keep the case at bar in *statu quo*, so that this Court may readily give relief to these debentureholders if its decision in *The North American Company* case shows that the termination of the debentureholders' investments by the national government was beyond its power?

The American Power & Light Company Case

In this case, now pending in the United States Circuit Court of Appeals for the First Circuit, the brief for the Company has been filed. It appears that the Company is seeking a review of an order of the Commission directing the dissolution of the Company pursuant to Section 11(b)(2) of the Act. It contends, among other things, that the order is a nullity, there being no Federal power to dissolve a corporation of another sovereign (in that case the State of Maine); that the constitutional limitations on Federal power imposed by the due process clause of the Fifth Amendment are violated by Section 11(b)(2); that the subsection does not rest, or purport to rest, on any Federal power such as the power over interstate commerce, and is therefore unconstitutional; and that the subsection is an unconstitutional delegation by Congress of power to the Commission.

It may be that the decision on those questions will be in conflict with the assumption of the Circuit Court of Appeals in the case at bar that there was no merit in similar contentions made by these petitioners. They desire to be in a position to present such conflict, if any, to this Court.

The subject matter of this litigation is a fund equal in amount to the sums which, if the debentureholders prevail, will be payable to them in lieu of future instalments of interest on their debentures. As the fund is held in escrow pending "final determination" of the question whether the debentureholders are entitled to the fund—upon the agreement that if the determination is not favorable to the debentureholders the fund will be turned over to Power—the rights of all persons concerned will be preserved by the holding of the fund in escrow, according to the agreement, pending the final decision of this Court.

WHEREFORE, the petitioners pray this Court for a rehearing of their petition for a writ of certiorari herein, and for the granting of the writ at this time, or, if the Court is of the opinion that the writ should not be granted at this time, then for the deferment of the decision on this petition for rehearing until the handing down of the decision of this Court in the case of The North American Company against the Commission, or until the handing down of the decision of the United States Circuit Court of Appeals in the case of American Power and Light Company against the Commission.

Respectfully submitted,

BEN LEROY STOWELL,
IRWIN L. TAPPEN,
For Petitioners.

May 3, 1943.

As counsel for the petitioners herein, we hereby certify that the foregoing petition is presented in good faith and not for delay.

BEN LEROY STOWELL,
IRWIN L. TAPPEN.



EXCERPTS FROM FINDINGS AND OPINION OF
SECURITIES AND EXCHANGE COMMISSION

For Release in the morning
newspapers of

Tuesday, April 6, 1943

HOLDING COMPANY ACT

Release No. 4215

SECURITIES AND EXCHANGE COMMISSION

PHILADELPHIA, PA.

In the Matter of
THE UNITED LIGHT AND POWER COMPANY
THE UNITED LIGHT AND RAILWAYS COMPANY
AMERICAN LIGHT & TRACTION COMPANY
CONTINENTAL GAS & ELECTRIC CORPORATION
UNITED AMERICAN COMPANY, and
IOWA-NEBRASKA LIGHT AND POWER COMPANY

Respondents

(File No. 59-17)

THE UNITED LIGHT AND POWER COMPANY AND
ITS SUBSIDIARY COMPANIES

Respondents

(File No. 59-11)

THE UNITED LIGHT AND POWER COMPANY

Applicant

(File No. 54-25)

(Public Utility Holding Company Act of 1935)

FINDINGS AND
OPINION

APPLICATION
No. 14

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The United Light and Power Company ("Power") and its subsidiary company, The United Light and Railways Company ("Railways"), both registered holding companies, have filed with the Commission joint applications and declarations, designated as "Application No. 14", pursuant to Sections 11(b) and 11(e) of the Public Utility Holding Company Act of 1935 ("the Act") for approval of a plan designed to effectuate the dissolution of Power in compliance with our order of March 20, 1941.¹ In sum-

¹ The United Light and Power Company, Holding Company Act Release No. 2636.

mary, the plan provides for the contribution of cash and minor investments of Power to Railways, and the distribution of Power's remaining asset consisting of all the outstanding common stock of Railways among the preferred, Class A and Class B common stockholders of Power, after which Power will be dissolved.

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COMPLIANCE WITH SECTION 11(e) OF THE ACT

As a condition precedent to granting our approval of a plan such as this we are required by Section 11(e) of the Act to find (1) that the plan is necessary to effectuate the provisions of Section 11(b) and (2) that the plan is fair and equitable to the persons affected by it.

Necessity for the Plan

We encounter no difficulty in making the first of these required findings. The plan provides for the liquidation and dissolution of Power, which we have previously found necessary under Section 11(b) (2) of the Act, and dissolution is to be preceded by the elimination of Power's stock liability through a distribution of assets in kind, a method we believe to be both economical and appropriate to effecting compliance with the standards of Section 11(b) of the Act.

Fairness and Equitableness of the Plan

The second required finding, namely, that the plan is "fair and equitable to the persons affected by such plan," presents a more difficult problem. The assets of Power are, in our opinion, of insufficient value to satisfy the stated liquidation preference of the preferred stock in the amount of \$100 per share for 600,000 shares, plus arrearages of \$38,700,000, or a total of \$98,700,000, as of December 31, 1942.

* * * * *

If the amount of the liquidation preference of the preferred stock (\$100 per share plus accumulated dividends) is controlling, our inquiry must perforce be ended at this point in a decision that the preferred stock is entitled to all the assets of the corporation to the exclusion of the common. Power's corporate charter provides that the liquidation preference of this stock shall come into operation in the event of "involuntary" liquidation. While the liquidation in this case is doubtless "involuntary," it is of a type that could not have been foreseen by the draftsmen of the corporate charter or by investors in the stock, long before the enactment of the Holding Company Act.¹² The question, then, is whether or not it would be "fair and equitable", in light of the legislative purpose and policy underlying Section 11 of the Act, to give controlling effect to that charter provision under the circumstances.

We have found no judicial precedents which are determinative of the precise question before us. Decisions like those in the *Los Angeles Lumber*¹³ and *Boyd*¹⁴ cases are predicated on sets of facts fundamentally distinguishable from the situation arising here. In bankruptcy or equity reorganizations, where some financial disaster overtakes or threatens to overtake an enterprise, the courts and Congress have proceeded on the theory that it is often in the interest of creditors and other claimants that the enterprise be permitted to continue in operation, but with a new capital structure. Creditors and other claimants are prevented from foreclosing or otherwise compelling an actual liquidation, but new securities are distributed among them according to their contractual and other rights determined *as though in liquidation*. The historical background of this approach is so familiar as to need no elaboration here.

¹² The preferred stock was created in 1929, six years prior to the passage of the Act. We think that involuntary liquidation, in the context in which that term is used in the corporate charter, connotes an act of default, either financially or in respect of conduct, on the part of the corporate management representing the common stock. In short, it contemplates protection of the preferred stock from business risks such as ordinarily attend equity investment. We do not, however, rest our decision upon this interpretation, as will be more fully developed, *infra*, but only point out that the draftsmen of the charter could not have had Section 11 of the Act in mind.

¹³ *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106.

¹⁴ *Northern Pacific Railway Co. v. Boyd*, 228 U. S. 482.









On the other hand, Power is a company virtually without debt and under no financial embarrassment in the traditional bankruptcy or equity sense. Since it falls into a category of holding companies which Congress has determined must *not* be permitted to continue in operation, in the interests of the public, investors and consumers, the company's security holders are prevented from maintaining their respective interests in a going corporation. In our view, it is not inconsistent with the bankruptcy and equity precedents to conclude that in reorganizations or liquidations to comply with Section 11, stockholders affected should be given participations according to their contractual or other rights determined *as though in a continuing enterprise*, and that the process of compliance with the statute should not be permitted to mature liquidation preferences. In both instances the measure of participation allowed should compensate for the substantive rights of security holders as they would exist apart from the reorganization or other procedure in question.

In the case before us, the duty to liquidate arises solely by virtue of a sovereign act, and in giving effect to the Congressional mandate we must not allow the liquidation itself to add value to one class of securities at the expense of another class.¹⁵

Where simplification of a system is to be attained through elimination of an unnecessary corporate entity, it is our opinion that the "fair and equitable" standard does not require us to consider liquidation rights as having matured, and as the sole measure of participation for the preferred stockholders; and it should be immaterial whether the simplification process takes the form of recapitalization, merger or distribution of the assets of a holding company in liquidation. In other words, the

¹⁵ Cf. *The United Light and Power Company*, S. E. C. (1942), Holding Company Act Release No. 3345 (aff'd *The New York Trust Co. v. S. E. C.*, 131 F. (2d) 274 (C. C. A. 2d, November 12, 1942)), in which we applied this reasoning to the liquidation of Power's debentures at par and accrued interest without premium. Our decision was based on the absence of any provision in the debenture agreements giving the holders a contract right to a premium under the circumstances presented. Thus we were not called upon to decide, and did not consider, what effect would be given to such a contract right if it had existed.

"fair and equitable" standard requires the same recognition of substantive rights irrespective of the method employed in a particular case for attaining the objectives of Section 11(b)(2).

More specifically, if a class of preferred stock has a measurable interest in an enterprise absent the maturing of liquidation preferences and a proportionately greater interest upon the maturity thereof, it would not be fair or equitable under the statute to give recognition to the greater interest at the expense and to the detriment of the common stock. And conversely, if the common stock has a measurable interest apart from the maturing of liquidation preferences, we must not sanction the destruction of that interest through the operation of the statutory mandate.^{15a}

Clearly the intent of Congress was that the techniques employed under Section 11 should be those necessary to remove the holding-companies' concentration of economic power over operating utilities, promote local management and regulation for the benefit of consumers, eliminate unnecessary and uneconomic corporate entities, and benefit investors generally by giving them more direct interests in the operating properties and earnings *to the extent that their holding-company securities represent any real equity therein*.¹⁶ The liquidation of Power accomplishes an im-

^{15a} This conclusion seems to us in no way inconsistent with the Commission's position as to the right of bondholders to a premium on liquidation, nor with the implications of the various cases arising under the Anti-Trust Acts which are referred to in the dissenting opinion. Interpretation of contract provisions is of course a necessary starting point for evaluating interests. There remains the question of what may be fair and equitable in the light of the entire bundle of contractual rights.

¹⁶ That this process was not to operate so as to destroy values was emphasized repeatedly. For example, in reviewing the integration and simplification provisions of the Senate bill, the report of the Committee on Interstate Commerce points out that one means of compliance would be for holding companies: "to distribute their securities and assets equitably among their security holders. Precedents under the Sherman Antitrust Act and under the Hepburn Act demonstrate that the necessary corporate adjustments can be made without forced liquidation or the sacrifice of legitimate investment values." Sen. Rep. No. 621 (74th Cong. 1st Sess.) at page 33. It is clear from the context that "forced liquidation" as used by the Committee meant forced sales.

Congressman Eicher (later Chairman of this Commission and now Chief Justice of the District Court of the United States for the District of

portant step in this direction by giving the preferred and common stockholders a security that is better than those they have heretofore held. This process of improvement of position must not be permitted to destroy any legitimate interests of the common stock, or present a windfall to any senior security. Where such an inequitable result would be reached by borrowing bankruptcy techniques for assessing the claims involved, we must reject bankruptcy techniques as inappropriate under the circumstances; and we think it logical enough that they should be inappropriate here, since the situation before us is (as we have seen) not comparable to the situation found in bankruptcy.¹⁷

It is pointed out in Commissioner Healy's separate opinion that the words "fair and equitable" embodied in Section 11 have a settled meaning, as determined by the courts, and that an application of the "absolute priorities"

Columbia), discussing the same bill (S. 2796), expressed his views and the views of other members of the House Committee in these terms:

"But Section 11 of the Senate bill would give fair assurance that what is left of the investor's equity would not hereafter be taken from him and it would give fair assurance that any legitimate increase in value of the underlying properties would go to investors * * *

"There is nothing in Section 11 of the Senate bill which will hurt any legitimate investment interest. It does strike and strike hard at that dangerous concentration of economic power which resides in the holding company." H. Rep. No. 1318 (74th Cong. 1st Sess.) at page 51.

In so far as pertinent to this question, the purposes of Section 11 in the final enactment coincided with those of the Senate Bill. See H. Rep. No. 1903 (74th Cong. 1st Sess.) at pages 65, 68-71.

¹⁷ Indeed, the legislative history of the Act appears to recognize the inapplicability of precedents in bankruptcy. See the statement of the Senate Committee, footnote 16, *supra*.

Earlier in the same report the Committee spoke of the courts exercising "all the extraordinary powers such courts have been accustomed to exercise when called upon under the Sherman and Hepburn Acts to effect compulsory corporate readjustments required by the public policy expressed in those acts." *Id.*, at page 13.

And further:

"* * * The process of compulsory divestment of control is left to the Federal courts, without time limit, for the applications of the technique worked out in the dissolution under the Sherman Act and the Hepburn Act (commodities clause).

"The title provides that during all court processes the Securities and Exchange Commission shall act as an impartial expert economic adviser and administrative assistant to the courts. That expert assistance will enable the courts to save time and expense in the solution of essentially economic and administrative problems for which in the Sherman Act cases it had no assistance except that of opposing counsel. But the courts can take such time as they deem advisable to dispose of assets without sacrifice." *Id.*, at page 14.

doctrine must result in no distribution to Power's common stock in this case. But that is because he measures the rights of the preferred stock as they would be measured in bankruptcy cases, and not merely because he follows the "absolute priorities" doctrine in determining the consequences of the measurement. In other words, we can agree with him when he says that absolute priorities must be respected, because we think that doctrine simply means that the common stock must not be accorded any participation unless the preferred stock has been fully compensated for its rights and priorities. But there the area of agreement stops, because he says further that the rights and priorities of the preferred stockholders are the same here as in bankruptcy cases, where their claims to liquidation preferences (including dividend arrearages) are treated as matured. In our view it would be unconscionable and contrary to the plain intention of Congress to so hold.

It is our conclusion that we must judge the fairness of the plan according to legitimate investment values existing apart from the duty of liquidation imposed by the statute. The existence of the liquidation preference does, of course, enter into the question as it is one of the bundle of rights belonging to the preferred stock and affecting its normal value. The preference itself, however, will not be permitted to operate so as to be conclusive in the division of assets between the preferred and common stocks.¹⁸

By the foregoing we do not imply that compensation should or can be given in eliminating any "rights" which are proscribed by the statute as being unfair, such as the naked "right" to exercise a voting power which is inequitable under the statutory standards, or the "right", by misuse of power, to delay or prevent compliance with the statute. The "legitimate investment value" to be accorded

¹⁸ This is the first instance in which we have been called upon to decide this precise question. To the extent that our conclusion is at variance with *dicta* in previous cases, such *dicta* are overruled.

For example in *Federal Water Service Corp., et al.*, 8 S. E. C. 893 (1941), we intimated that in a liquidation required under Section 11(b)(2) the rules applicable to a bankruptcy reorganization proceeding would be applicable (p. 910). That case did not involve liquidation of any kind, and the language referred to was not necessary to the decision.

recognition may include those rights and expectancies which, although possibly predicated on an unsound or economically undesirable structure, are not inherently unfair. An example is the interest of the common stock in net income over and above fixed amounts applicable to senior securities—where there is a reasonable chance of such income. Although it is repugnant to the policies of the Act to have the corporation continue in operation, the common stockholders' interest in the earnings of Power's assets is not for that reason proscribed. The limitation of the preferred stock dividend to a fixed amount is a valuable right vested in the common stock; and the value of such right, in light of the earning capacity of Power's assets, may be recognizable even though it would take a number of years, in the absence of liquidation, for dividends to be payable to the common stock. The accumulation of preferred dividend arrearages does not constitute a matured claim in the absence of liquidation, and does not require compensation to the preferred stockholder for the lapse of time which may precede payment.

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To accelerate the arrearages and translate them into matured claims at their full face amount, so as to entitle the preferred stock not only to all the assets but also in perpetuity to the entire earning power of those assets—a portion of which would otherwise have been applicable to the common stock—would clearly be to enrich the preferred at the expense of the common.

Under the circumstances, fair and equitable compensation will be given to all of the claimants if their rights are measured not in terms of the situation created by the statute but rather in terms of the situation terminated by it—*i. e.*, as though no liquidation were to take place. In this way each class of stock will be accorded its proportionate share of the benefits to be gained from the elimination of a useless and expensive corporate entity and from the receipt of a security representing a more direct investment in the underlying assets and earnings of the system.

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End

